No. 94-820-CFX
Status: GRANTED

Title: Metropolitan Stevedore Company, Petitioner
v.
John Rambo, et al.

Docketed:
November 7, 1994

Court: United States Court of Appeals for
the Ninth Circuit

Vide:
94-1045

Counsel for petitioner: Babcock,Robert E.

Counsel for respondent: Pierry,Thomas J., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 7 1994	G	Petition for writ of certiorari filed.
3	Dec 1 1994		Brief of respondent John Rambo in opposition filed.
2	Dec 7 1994		DISTRIBUTED. January 6, 1995 (Page 15)
4	Dec 28 1994		REDISTRIBUTED. January 13, 1995 (Page 2)
6	Jan 13 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 23, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, March 23, 1995. Rule 29.2 does not apply.
			**********
7	Feb 2 1995		SET FOR ARGUMENT TUESDAY, APRIL 25, 1995. (3RD CASE).
9	Feb 15 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
10	Feb 21 1995		Brief amici curiae of National Association of Waterfront Employers, et al. filed.
11	Feb 22 1995		Brief of respondent Director, Office of Workers' Compensation Programs filed.
12	Feb 23 1995		Brief of petitioner Metropolitan Stevedore Company filed.
13	Feb 23 1995		Joint appendix filed.
18	Feb 23 1995		Brief amicus curiae of Industrial Indemnity Insurance Company filed.
16	Feb 24 1995		CIRCULATED.
17	Feb 24 1995		Record filed.
		*	Certified record proceedings Benefits Review Board (Copy received from U.S.Court of Appeals, Ninth Circuit)
19	Mar 8 1995	G	Motion of the Solicitor General for divided argument filed.
20	Mar 20 1995		Motion of the Solicitor General for divided argument GRANTED.
21	Mar 22 1995	X	Brief of respondent John Rambo filed.
22	Apr 10 1995	X	Reply brief of petitioner filed.
23	Apr 14 1995	X	Reply brief of respondent filed.
24	Apr 25 1995		ARGUED.

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OFFICE OF THE CLERK

No. 94-___

In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 22 of the Longshore and Harbor Workers' Compensation Act permits modification of a compensation award when successful retraining and reemployment efforts increase the worker's earning capacity.

LIST OF PARTIES

The parties to the proceeding resulting in the decision sought to be reviewed are:

John Rambo

Metropolitan Stevedore Company;[1] and

Director, Office of Workers' Compensation Programs, United States Department of Labor

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[1] In accordance with Rules 14.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

1. Administrative Proceedings 4

2. The Decision on Appeal 5

REASONS FOR GRANTING THE PETITION 5

A. The Rulings Of The Fourth And Ninth Circuits Conflict 7

B. Although *Fleetwood* And *Rambo* Are The Only Cases That Directly Address The Issue Presented Here, The Ninth Circuit Probably Stands Alone In Requiring That Physical Change Precede Modification 9

C. The Ninth Circuit's Ruling Is Neither Sensible Nor Consistent With The Statutory Scheme .. 11

CONCLUSION 14

APPENDICES

Order of the United States Court of Appeals for the Ninth Circuit denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc*, filed August 10, 1994 ..... 1a

Opinion of the United States Court of Appeals for the Ninth Circuit, 28 F.3d 86 (9th Cir. 1994), filed June 24, 1994 ..... 2a

Decision and Order of the Benefits Review Board, filed November 9, 1992 ..... 6a

Administrative Law Judge's Decision and Order Granting Modification, dated May 29, 1991 ..... 11a

TABLE OF AUTHORITIES

Page

CASES

Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992) 10

Banks v. Chicago Grain Trimmers Association, 390 U.S. 459 (1968) 8

Burley Welding Works, Inc. v. Lawson, 141 F.2d 964 (5th Cir. 1944) 9, 10

Fleetwood v. Newport News Shipbuilding & Drydock Co., 776 F.2d 1225 (4th Cir. 1985) ..... *passim*

General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 673 F.2d 23 (1st Cir. 1982) 9, 10

Hole v. Miami Shipyard Corporation, 640 F.2d 769 (5th Cir. 1981) 10, 11

Intercounty Construction Corp. v. Walter, 422 U.S. 1 (1975) 9

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 6

La Faille v. Benefits Review Board, 884 F.2d 54 (2d Cir. 1989) 10

Liberty Mutual Insurance Co. v. Commercial Union Insurance Co., 978 F.2d 750 (1st Cir. 1992) 6

Lockheed Shipbuilding Co. v. Director, OWCP, 498 U.S. 1073 (1991) 6

McBride v. Eastman Kodak Co., 844 F.2d 797 (D.C. Cir. 1987) 6

McCormick S.S. Co. v. United States Employees' Compensation Commission, 64 F.2d 84 (9th Cir. 1933) 8

TABLE OF AUTHORITIES – Continued

Page

C'Keeffe v. Aerojet-General Shipyards, Inc., 404 U.S. 254 (1972) 8

Pillsbury v. Alaska Packers Association, 85 F.2d 758 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) 8

Rambo v. Director, Office of Workers' Compensation Programs, 28 F.3d 86 (9th Cir. 1994) ..... *passim*

Randall v. Comfort Control, 725 F.2d 791 (D.C. Cir. 1984) 10

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 6

State of Washington v. W.C. Dawson & Co., 264 U.S. 149 (1924) 6

Stevens v. Director, OWCP, 909 F.2d 1256 (9th Cir. 1990), *cert. denied sub nom., Lockheed Shipbuilding Co. v. Director, OWCP*, 498 U.S. 1073 (1991) 6

STATUTES

28 U.S.C. § 1254(1) 2

33 U.S.C. § 902(10) 2, 6, 12

33 U.S.C. § 902(18) 13

33 U.S.C. § 908(c)(21) 2, 4, 6

33 U.S.C. § 908(h) 2, 6

33 U.S.C. § 908(j) 13

33 U.S.C. § 909(b) 13

33 U.S.C. § 921(c) 5

33 U.S.C. § 922 ..... *passim*

No. 94-___

In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Metropolitan Stevedore Company (hereinafter "Metropolitan") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (Appendix, *infra*, 2a-5a) is reported at 28 F.3d 86. The Order denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* (App., *infra*, 1a) is unpublished. The Decision and Order of the Benefits

Review Board (App., *infra*, 6a-10a) and the Decision and Order of the Administrative Law Judge (App., *infra*, 11a-17a) are unreported.

JURISDICTION

The Decision of the United States Court of Appeals for the Ninth Circuit was filed on June 24, 1994. (App. 2a) A timely Petition for Rehearing filed by Metropolitan was denied on August 10, 1994. (App. 1a) A Petition for Rehearing filed by the Director, Office of Workers' Compensation Programs, was denied on September 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2(10), 8(c)(21), 8(h), and 22 of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. Sections 902(10), 908(c)(21), 908(h), and 922, provide in relevant part as follows:

> 2(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;. . . .
>
> * * *
>
> 8(c)(21) . . . compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in

the same employment or otherwise, payable during the continuance of partial disability.

* * *

8(h) . . . if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the [Administrative Law Judge] may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * *

Sec. 22. . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . the [Administrative Law Judge] may . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

STATEMENT

The United States Court of Appeals for the Ninth Circuit has ruled that the phrase "change in conditions" in Section 22, the LHWCA's single provision authorizing modification of awards, encompasses only "a change in a claimant's *physical* condition." *Rambo v. Director, Office of Workers' Compensation Programs*, 28 F.3d 86, at 87 (9th Cir. 1994) (emphasis in original) (App. 3a). This interpretation

is directly contrary to that adopted by the United States Court of Appeals for the Fourth Circuit, which has concluded that modification pursuant to Section 22 may be granted whenever a change in wage-earning capacity is proven and even if the improved or diminished ability to earn is accompanied by no change in a claimant's physical condition. *Fleetwood v. Newport News Shipbuilding & Drydock Co.*, 776 F.2d 1225, at 1232 (4th Cir. 1985). The question presented is which of these conflicting interpretations should control a workers' compensation system designed to serve as the nationally uniform determinant of the rights and responsibilities of injured maritime workers and their employers.

1. *Administrative Proceedings.* In November 1983, an Administrative Law Judge approved stipulations that John Rambo's back and leg injuries had lessened his weekly capacity to earn wages as a longshoreman by $120 and, pursuant to 33 U.S.C. Section 908(c)(21), awarded weekly benefits of $80. A few years later, Mr. Rambo completed necessary retraining and obtained a position as a crane operator, a much higher paying and less physically strenuous position.[2]

Metropolitan sought modification of the original award, contending that continuing benefits were no longer appropriate because the retraining and successful search for work as a crane operator had increased Mr. Rambo's earning capacity to the point that his economic

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[2] The new skills generated earnings of $1,505.21 weekly at the time modification was granted, a figure nearly triple the wages earned before injury in less skilled longshore work. *Rambo*, 28 F.2d at 86, App. 3a.

disability had ended. Mr. Rambo argued that his original award could be reduced only if his *physical* condition had improved.

The Administrative Law Judge rejected Mr. Rambo's argument, determined that his new skills and job had ended the adverse economic effects of the physical problems, and ordered benefits stopped. The Benefits Review Board affirmed.

2. *The Decision on Appeal.* Mr. Rambo appealed to the United States Court of Appeals for the Ninth Circuit, basing jurisdiction upon 33 U.S.C. Section 921(c). The Court reversed the earlier decisions, rebuffed the arguments advanced by Metropolitan and the Director, rejected the Fourth Circuit's analysis in *Fleetwood*, and ordered benefits continued at the original level because

> [A] mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition.

Rambo, 28 F.3d at 87, App. 4a. Requests for rehearing were filed by Metropolitan and the Director, OWCP. Both requests were denied and the accompanying Suggestions for Rehearing *En Banc* rejected.

REASONS FOR GRANTING THE PETITION

The LHWCA is intended to be the nationally uniform determinant of the rights and responsibilities of injured

maritime workers and their employers.[3] In all Circuits, the LHWCA's weekly benefit in cases similar to Mr. Rambo's is initially determined after assessment of *both* the "degree of physical impairment" *and* "any other factors or circumstances in the case which may affect [the worker's] capacity to earn wages in his disabled condition."[4] Compensation for the worker's lost earning capacity must be paid for as long as the loss of earning capacity continues,[5] subject to change only in accordance with Section 22.

Within the Fourth Circuit, benefits may be adjusted to fit changing economic circumstances. Within the Ninth Circuit, injured maritime workers and their employers are locked into the original benefit level unless the worker's physical condition changes and even if some or all of the other factors that initially determined the effect of the injury upon the worker's ability to earn change

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[3] Indeed, this Court's recognition of the need for a nationally uniform maritime compensation system forced enactment of the LHWCA. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); and *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

[4] 33 U.S.C. § 908(h). *See also* 33 U.S.C. § 902(10) (defining "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"; *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750 (1st Cir. 1992); *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988); *Fleetwood, supra;* and *Stevens v. Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990), *cert. denied sub nom., Lockheed Shipbuilding Co. v. Director, OWCP*, 498 U.S. 1073 (1991).

[5] 33 U.S.C. Section 908(c)(21) requires payment of benefits "during the continuance of partial disability."

dramatically. Within the Ninth Circuit, the successful rehabilitation of physically impaired workers will not alter the weekly benefit level even if the new positions pay more than the jobs held before injury. Within the Ninth Circuit, workers whose disabilities were originally found nominal can secure no benefit increase if corporate restructuring, automation, increased foreign competition, or other changes combine with the physical limitations to erase future prospects for employment. Within the Fourth Circuit, both rehabilitated workers and those who bear the brunt of adverse economic change receive benefits appropriate to the true economic effects of the injury.

This case merits the Court's review because (1) there exists a direct conflict between the rulings of the Fourth and Ninth Circuits, (2) the conflict prevents the uniform application which the LHWCA requires, and (3) the Ninth Circuit's insistence that change in physical condition is an essential prerequisite to modification precludes the benefit flexibility which the LHWCA was designed to assure.

A. The Rulings Of The Fourth And Ninth Circuits Conflict.

The facts of the *Fleetwood* and *Rambo* proceedings are closely parallel, the results completely opposite. Mr. Fleetwood, a recipient of LHWCA benefits for lessened earning capacity, acquired new skills and a new, more remunerative job. An Administrative Law Judge determined that Mr. Fleetwood's earning capacity had improved to a degree which extinguished the earlier loss and terminated benefits. The Benefits Review Board

affirmed and Mr. Fleetwood appealed, arguing that modification pursuant to Section 22 was available only if his *physical* condition had changed.

The Fourth Circuit carefully distinguished the cases upon which Mr. Fleetwood relied and rejected his argument because "it is not in keeping with the purpose of the Act, which is to compensate workers for injuries that affect their wage-earning capabilities." *Fleetwood, supra,* at 1228-29. Presented with strikingly similar circumstances and the identical argument, the Ninth Circuit harkened back to its 60-year-old opinion in *McCormick S.S. Co. v. United States Employees' Compensation Commission,* 64 F.2d 84 (9th Cir. 1933), mischaracterized the true holding of that case,[6] and, without any discussion of statutory purposes or policies, reached the opposite result.

The conflict between the two Circuits could not be more pronounced. *Only* the Fourth Circuit's interpretation is consistent with the views expressed by this Court on each of the three occasions it has examined the history and intent of Section 22. The Ninth Circuit's ruling is "narrowly technical and impractical," at odds with the LHWCA's language and intent. *See O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254, at 255 (1972). *See also Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459

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[6] *McCormick* proves on careful reading to stand only for the unassailable proposition that a change in wages does not *necessarily* represent a change in earning capacity. The other Ninth Circuit precedent referenced in the decision below, *Pillsbury v. Alaska Packers Association,* 85 F.2d 758 (9th Cir. 1936), *rev'd on other grounds,* 301 U.S. 174 (1937), also involved no debate between changes in economic or physical conditions.

(1968) and *Intercounty Construction Corp. v. Walter*, 422 U.S. 1 (1975).

B. Although *Fleetwood* And *Rambo* Are The Only Cases That Directly Address The Issue Presented Here, The Ninth Circuit Probably Stands Alone In Requiring That Physical Change Precede Modification.

The Ninth Circuit's single-page analysis asserted that its conclusion, although different from that reached by the Fourth Circuit, was consistent with the views of the First and the Fifth.

> The Fourth Circuit's rule conflicts with the positions taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25, n.6 (1st Cir. 1982) ('Courts uniformly have held that a "change in conditions" . . . means a change in the employee's *physical condition*, not other conditions.' (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury* and holding that '[i]t has been uniformly held that the term "change in conditions" . . . means a change in the employee's *physical condition*, and not other conditions.' (emphasis added)). Thus, this Circuit's precedent is supported by the clear weight of authority.

Rambo, supra, at 88, App. 5a.

The Court was at least partially mistaken. *Burley* is almost certainly no longer the law within the Fifth Circuit.

> The LHWCA also provides for modification of an order awarding compensation 'on the ground of a change in conditions.' 33 U.S.C. § 922. The BRB and the Fourth Circuit have recognized that a change in wage-earning capacity, without a change in the claimant's physical condition, is a basis for modification. *See Fleetwood v. Newport News Shipbuilding & Drydock*, 776 F.2d 1225, 1228 (4th Cir. 1985); *Blake v. Ceres, Inc.*, 19 Ben. Rev. Bd. Serv. (MB) 219, 221 (1987). Therefore, if a claimant's wage-earning capacity increases to a rate higher than his pre-injury wages, the employer may request a modification on the basis that there is no longer a loss in wage-earning capacity. This interpretation of the statute is 'in keeping with the purpose of the Act, which is to compensate workers for injuries that affect their wage-earning capacities.' *Fleetwood*, 776 F.2d at 1228-29.

Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, n.6 at 1042 (5th Cir. 1992). *See also Hole v. Miami Shipyard Corporation*, 640 F.2d 769 (5th Cir. 1981), approving awards of nominal benefits for the purpose of assuring future modification rights to workers faced with the possibility of future earning capacity changes.

General Dynamics, the First Circuit case on which the Ninth Circuit leaned, did not involve the issue at hand and simply offered an *in dicta* recitation of *Burley*'s own outmoded dictum. The fact that the Second[7] and District of Columbia[8] Circuits have taken the tack sailed by the

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[7] *LaFaille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989).

[8] *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984).

Fifth in *Miami Shipyard* suggests that the Ninth Circuit stands alone or, possibly, accompanied by only the First in its interpretation of Section 22.

C. The Ninth Circuit's Ruling Is Neither Sensible Nor Consistent With The Statutory Scheme.

The reference to "conditions" (emphasis added, plural in original) in Section 22, if not itself indicative of an intent to encompass all factors impacting earning capacity, is at least ambiguous. The resolution of an ambiguity justifies reference to both common sense and the overall statutory scheme. Neither supports the Ninth Circuit's approach.

The Ninth Circuit's requirement that physical change underly modification simply makes no sense. Why should a worker with a deteriorating back be entitled to increased benefits and an injured worker adversely affected by a changing economic environment be denied similar relief? Why should an employer be rewarded with lowered benefit liability when *physical* rehabilitation efforts succeed and be denied a similar reward when reasonable accommodations to the worker's limitations can assure continued employment? What rationale supports continued benefit payments to any worker who regains the ability to earn the amounts originally lost?

The Ninth Circuit neither considered nor addressed these issues. The Fourth Circuit did.

> Under the Act, 'disability' is defined as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' 33

U.S.C. § 902(10). Thus, the Board was correct when it concluded that a worker is not compensated solely for physical impairment, but rather the worker is compensated for the future economic loss attributable to the physical impairment. The worker initially must prove his loss of wage-earning capacity to obtain benefits; therefore, his wage-earning capabilities should be relevant when considering a modification of an award. Thus, for example, if an employee initially was awarded a 40-percent partial disability award, and later found that his wage-earning capacity was much less than originally determined, he could then seek a modification. Likewise, an employer who finds that an employee's wage-earning capacity has not been affected to the degree originally determined should be able to seek a modification. As this case demonstrates, it is possible for a worker to show no physical improvement, but at the same time to acquire new job skills that enable him to compete again in the workforce. A sensible modification procedure would allow employees whose loss of wage-earning capacity becomes more apparent over time to obtain a larger disability award at a later date without requiring such an employee to demonstrate that his physical condition caused by the accident had changed. We fail to see how an employee whose wage-earning capacity had declined could be treated differently from the employee whose wage-earning capacity had improved without rendering inconsistent interpretations of the same statutory section of the LHWCA.

Without such a modification procedure, workers who had secured new skills and

> employment would be receiving disability compensation when they were not disabled and an unequitable distribution of limited financial resource would result. . . . Overall, the statutory scheme indicates that as long as an employee's physical injury affects his wage-earning capacity, he should be able to obtain disability payments; but, he should not be able to receive a stream of constant payments regardless of his wage-earning capacity.

Fleetwood, supra, at 1229.

The absence of a persuasive rationale for the Ninth Circuit's conclusion is not surprising. In a system which promises to deliver benefits when injury causes *economic* loss, there can be no justification for restricting benefit adjustment to those demonstrating *physical* change. In fact, such a restriction is wholly inconsistent with at least two other circumstances in which the LHWCA clearly contemplates modification of existing awards.[9]

Only the Fourth Circuit's interpretation of Section 22 is consistent with the LHWCA's focus on earning capacity and the clear need for modification avenues in other contexts. The Fourth Circuit's opinion both encourages and rewards the retraining and reemployment of injured

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[9] LHWCA benefits for death are clearly intended to terminate upon remarriage or loss of "student" status. *See* 33 U.S.C. §§ 909(b) and 902(18). If Section 22 requires physical change, the only route to an order terminating liability is unavailable. Post-award earnings must be reported on pain of benefit forfeiture. 33 U.S.C. § 908(j). If only physical change may justify benefit modification, no reason for the reporting requirement exists.

workers. The Ninth Circuit's conclusion discourages both.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: November 4, 1994.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO, Claimant-Petitioner, v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents.	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 ORDER (Filed Aug. 10, 1994)

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

Cite as 94 C.D.O.S. 4781

JOHN RAMBO, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents,

No. 92-70783

United States Court of Appeals for the Ninth Circuit

OWCP No. 18-6945 BRB No. 91-1538

Petition for Review of an Order of the Benefits Review Board Argued and Submitted March 14, 1994 – San Francisco, California

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

COUNSEL

Thomas J. Pierry, Magana, Cathcart, McCarthy & Pierry, Wilmington, California, for the petitioner.

LuAnn Kressley, United States Department of Labor, Office of the Solicitor, Washington, D.C., for the respondents.

Filed June 24, 1994

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for the benefits because he was presently working at a job that paid him $1,505.21 per week – almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. § 922.[1] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's *physical* condition can justify an award modification. A change in a claimant's wages, training,

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[1] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

Analysis

Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages – without proof of a change in his physical condition – was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. § 922. *See* id. at 86 (rejecting the petition for modification because it was not based upon "*a change in physical condition*," but rather upon the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. § 922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. See id. at 1235 (Warriner, J., dissenting) (noting that "[b]eginning

with the first opinion dealing with the question, [*McCormick,*] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. § 922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent, *United States v. Lewis*, 991 F.2d 524, 525 n.1 (9th Cir.), *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*, and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

(seal)

BRB No. 91-1538

JOHN RAMBO Claimant-Petitioner	)	**NOT PUBLISHED**
v.	)	
METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER
Respondent	)	(Filed Nov. 9, 1992)

Appeal of the Decision and Order Granting Modification of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry (Magana, Cathcart, McCarthy & Pierry), Wilmington, California, for claimant.

James J. Wood, Long Beach, California, for self-insured employer.

LuAnn Kressley (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (83-LHC-242) of Administrative Law Judge Daniel Lee Stewart on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 9, 1980, claimant injured his back and leg while working for employer. In a Decision and Order dated November 28, 1983, Administrative Law Judge James J. Butler awarded claimant temporary total disability compensation from September 10, 1980 through November 22, 1981, and permanent partial disability compensation thereafter. Pursuant to the stipulations of the parties, the administrative law judge found that claimant's average weekly wage at the time of injury was $534.38, that claimant had sustained a 22 1/2 percent impairment of the whole person which the parties equated to a $120.24 per week loss in wage-earning capacity, and that accordingly claimant was entitled to permanent partial disability compensation based on an $80.16 per week compensation rate. In addition, the administrative

law judge awarded claimant's counsel an attorney's fee payable by employer, *see* 33 U.S.C. §928, and awarded employer relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Thereafter on October 30, 1989, employer sought modification of the permanent partial disability award pursuant to Section 22, 33 U.S.C. §922, arguing that there had been a change in claimant's wage-earning capacity such that he is no longer disabled. In a Decision and Order dated May 29, 1991, Administrative Law Judge Daniel Lee Stewart granted modification, noting that claimant had completed training and was currently working as a crane operator, a higher paying yet less strenuous job, which he had been performing for four or five years and was not in danger of losing. In addition, Judge Stewart noted that claimant also was able to obtain additional pay by volunteering to work as a lift truck operator and heavy lift truck operator. Finally, Judge Stewart found that claimant's average weekly wage had more than tripled between the time of his injury in 1980 and the hearing in 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, he concluded that claimant no longer had a loss in his wage-earning capacity. The administrative law judge therefore ordered that the award of permanent partial disability compensation be terminated as of the date of the decision and order. Claimant appeals, arguing that the granting of modification was improper. Employer and the Director, Office of Worker's Compensation Programs, respond, urging affirmance.

Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the

date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. §922. With the enactment of the 1984 Amendments to the Act, Section 22 was amended to prohibit the modification of settlements which were entered into pursuant to Section 8(i), 33 U.S.C. §908(i)(1988). The Board had previously reached the same conclusion under the pre-1984 Act. *See Lambert v. Atlantic & Gulf Stevedores,* 17 BRBS 68 (1985).

Initially, we reject claimant's assertion that Judge Butler's original Decision and Order constitutes the approval of a Section 8(i) settlement which could not be modified pursuant to Section 22. This decision fails to provide for the complete discharge of employer's liability and lacks any findings as to whether the compensation awarded was in claimant's best interest as was required under Section 8(i) at the time of Judge Butler's decision. 33 U.S.C. §908(i) (1982) (amended 1984). Accordingly, Judge Butler's Decision and Order was, as Judge Stewart properly determined, simply an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22. *Norton v. National Steel & Shipbuilding Co.,* 25 BRBS 79, 84 (1991); *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

Claimant's contention that the administrative law judge erred in granting modification absent a showing of a change in his physical condition is similarly without merit. Contrary to claimant's assertions Judge Stewart correctly recognized that modification pursuant to Section 22 may be granted based solely upon a change in claimant's economic condition. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.,* 776 F.2d 1225, 18

BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1991); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989). Claimant has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on claimant's increase in wage-earning capacity after the original award of benefits. We therefore affirm his determination that claimant was no longer disabled as of the date of his decision.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nance S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

U.S. Department of Labor Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California
94105

(seal)

In the Matter of JOHN RAMBO Claimant against METROPOLITAN STEVEDORE COMPANY, Self-Administered Employer	Case No. 83-LHC-242 OWCP No. 18-6945

DECISION AND ORDER GRANTING MODIFICATION

This proceeding involves a request for modification of the November 28, 1983, Decision and Order Awarding Benefits of Administrative Law Judge Butler. The request for modification was filed on October 30, 1989, pursuant to the provisions of 30 U.S.C. § 922.

ISSUES

1. Whether the employer's request for modification of the 1983 Decision and Order under the provisions of 30 U.S.C. § 922 should be granted.

2. Whether the administrative law judge who approved the settlement is the one required to rule on the issue of modification.

Background

The parties stipulated that the Claimant, John Rambo, became permanently, partially disabled as the result of an injury to his back and leg sustained on September 9, 1980; that the Claimant's condition became permanent and stationary on November 16, 1981; and that the Claimant sustained an overall current permanent partial disability equivalent to 22½% of the whole person amounting to a compensation rate of $80.16 per week for permanent partial disability. This stipulated "settlement" was incorporated into a Decision and Order of the administrative law judge. The only issue which the administrative law judge decided in his Decision and Order was whether § 908(f) was applicable.

Then, on October 30, 1989, Employer filed an application for modification under Section 922 alleging that the Claimant's current earning capacity had increased substantially.

JURISDICTION

A. Administrative Law Judge

Claimant alleges that the motion for modification must be heard by the same administrative law judge assigned to the original claim. This allegation is without merit. In *Finch v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 196 (1989), the Benefits Review Board held that there is no requirement under the Act that a motion for modification must be heard by the same administrative law judge assigned to the original claim.

B. Section 922 Modification

Claimant contends that the stipulations contained in the November 28, 1983, Decision and Order of the administrative law judge constitute a settlement between the parties. However, Judge Butler's Decision and Order awarding benefits does not constitute the approval of a settlement because it fails to provide in specific terminology for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in the Claimant's best interest as is required under Section 8(i) of the Act. *Finch v. Newport News Shipbuilding and Dry Dock Company, supra.* Therefore, Judge Butler's Decision and Order must be considered as an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22.

DISCUSSION

In the original Decision and Order dated November 28, 1983, it was stipulated that the Claimant's average weekly wages were $534.38 per week at the time of the pertinent injury, that Claimant sustained an overall current permanent partial disability equivalent to 22.5% of the whole person which produced a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

Section 22 of the Act, 33 U.S.C. §922, authorizes the modification of a Decision and Order based on a change in condition or mistake of fact at any time prior to one year after the last payment of compensation. Modification based on a change in condition may be granted in cases in

which the claimant's economic condition has changed following the entry of an award of compensation. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company,* 16 BRBS 282 (1984).

Employer in the instant case contends that since Claimant is presently earning more money than at the time of his injury, Claimant did not have a loss of wage-earning capacity. However, higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.,* 10 BRBS 649 (1979). One has to consider wage-earning capacity in an open labor market under normal employment conditions.

Claimant testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working fulltime as a longshoreman (Tr. 27-8).[1] He is presently working steadily as a crane operator for American President Lines (Tr. 28, 32). He has been working as a crane operator for four or five years (Tr. 28). In addition to working as a crane operator, Claimant volunteers for work as a lift truck operator and a heavy lift truck operator for which he receives additional pay (Tr. 28-30). When Claimant works as a crane operator, he works most of the time as a gantry crane operator (Tr. 31). The crane which he operates is 131 feet high (Tr. 31). In order to reach the place where he works, Claimant has to climb a 12 to 15 foot ladder and then take an elevator (Tr.

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[1] In this decision, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's Exhibits and "Tr." refers to the transcript of the hearing.

31). As a crane operator, he is not allowed under the contract to work more than 42.5 hours per week (Tr. 33).

According to the Claimant, he is now making $1,550.00 per week (Tr. 36). He prefers doing crane work because it pays more money and it is easier work than some of the other jobs (Tr. 38).

Claimant testified that his physical condition since 1983, when he was awarded permanent partial disability, has remained about the same (Tr. 38-9).

According to the Claimant, Matson Lines has laid off 50 men; however, there has been no indication by the company for which he works that anyone is going to be laid off (Tr. 34).

The evidence in the instant case shows that Claimant earned a total of $70,662.67 for 1985 for an average weekly wage of $1,358.90; a total of $68,006.22 for 1986 for an average weekly wage of $1,307.81; a total of $67,953.72 for 1987 for an average weekly wage of $1,306.80; a total of $76,332.19 for 1988, for an average weekly wage of $1,467.93; a total of $87,873.53 for the work beginning December 31, 1988, and ending December 23, 1989, for an average weekly wage of $1,689.88; and a total of $67,619.96 for the week beginning December 30, 1989, and ending September 22, 1990, for an average weekly wage of $1,690.50.

Claimant's average weekly wages have increased from $534.38 per week in 1980 when Claimant was injured to $1,690.50 as of September 22, 1990. This demonstrates that the Claimant's average weekly wages more

than tripled from 1980 to 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

Accordingly, I find that the Claimant no longer has a wage-earning capacity loss and that his disability payments should be discontinued effective on the date of this Decision and Order.

ATTORNEY'S FEES

Inasmuch as the Claimant did not prevail in this proceeding, the attorney is not entitled to any fee.

ORDER

It is hereby ORDERED that Claimant's disability be terminated effective as of the date of this Decision and Order.

/s/ Daniel Lee Stewart
DANIEL LEE STEWART
Administrative Law Judge

Dated: MAY 29, 1991
San Francisco, California

DLS:bll

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

No. 94-820

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
vs.
JOHN RAMBO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a party seeking a 33 U.S.C. § 922 Modification of an Award of Permanent Partial Disability prove that the Claimant has undergone a change in "physical condition"?

2. Should the Employer's Application For Modification be denied because of the representations of its attorney to the injured worker that the award would be paid for life? (S. Ct. Rule 15.1)

PARTIES TO THE PROCEEDING

Petitioner, Metropolitan Stevedore Company has reported that it has no parent companies and no subsidiaries that are not wholly owned.

Respondent, John Rambo is an individual resident of Los Angeles, California.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATEMENT OF CASE 1

A. Nature Of The Case 1

B. The Ninth Circuit's Decision 4

ARGUMENT AND AUTHORITIES 5

CONCLUSION AND PRAYER 9

APPENDIX A
Excerpts from Employer's Application for Modification § 922 . . . . . A1

APPENDIX B
Excerpts from Claimant's Trial Brief B1

APPENDIX C
Excerpts from Transcript of Hearing, Office of Administrative Law Judges C1

APPENDIX D
Published Opinion, Ninth Circuit Court of Appeals, Filed June 24, 1994 . . . . . D1

TABLE OF AUTHORITIES

Page

Cases

Bay Ridge Operating Co. v. Lowe,
14 F. Supp. 280 (S.D. N.Y. 1936) 7

Fleetwood v. Newport Shipbuilding
& Dry Dock Co.,
776 F.2d 1225 (4th Cir. 1985) 3, 4, 8

McCormick S.S. Co. v. United States
Employees' Compensation Comm'n,
64 F.2d 84 (9th Cir. 1933) 7, 8

Rizzi v. The Four Boro Contractor Corp.,
1 BRB 130 (1974) 7, 8

Statutes

33 U.S.C. § 922 . . . . . .5, 7, 9

No. 94-820

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
vs.
JOHN RAMBO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court:

The Respondent, John Rambo, respectfully requests that this Court deny the Petition For Writ of Certiorari submitted by the Petitioner, Metropolitan Stevedore Company, seeking review of the Ninth Circuit's decision in this case.

STATEMENT OF CASE

A. Nature Of The Case

The Respondent, John Rambo, ("Rambo") a longshoreman was injured within the course and scope of his employment on September 9, 1980, while employed

by Petitioner, Metropolitan Stevedore Company ("Metropolitan").

Trial was set in 1983 before his Honorable Administrative Law Judge James J. Butler. Rambo was represented by counsel and the employer was represented by James J. Wood. Among other things, the parties stipulated:

> "That the employee sustained an overall current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an 'economic disability' producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability." (Appendix B2).

On November 28, 1983, his Honorable Administrative Law Judge, William J. Butler, issued a Decision and Order awarding benefits to Rambo at the rate of $80.16 per week for permanent partial disability.

On October 30, 1989, "Metropolitan" filed with the Department of Labor an "Employer's Application For Modification, Section 922." ("Modification") (Appendix A1-A3).

The Modification contained no medical evidence and did not allege a change in Rambo's physical condition. The Modification relied solely on Rambo's post award earning records. "In this case we [Petitioner] can clearly show simply by the earnings information alone . . ." (Appendix A3).

A Formal Hearing on the modification was convened on October 15, 1990, by his Honorable Administrative Law Judge Daniel Stewart ("ALJ"). At the commencement of the hearing, "Rambo" moved to dismiss the

Application for Modification on the ground that the "Modification" failed to allege nor was it supported by evidence of a change in Rambo's "physical condition." (Appendix C3-C5). The Motion was denied.

Rambo's earning records were admitted into evidence and the only witness called to testify was Rambo.

The ALJ's findings included the following:

1. "[Rambo] testified that his physical condition since 1983 when he was awarded permanent partial disability, has remained about the same. (Appendix C7)

2. "[Rambo] testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working full time as a longshoreman. He is presently working steadily as a crane operator . . ." (Appendix C6).

In addition, Rambo testified that he was told by Mr. James J. Wood at the 1983 trial that if he accepted the sum of $80.16 per week, it would be paid for life.

In Open Court, on the record, Mr. Wood said:

> "Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I guess." (Appendix C8).

Mr. Wood did *not* call himself as a witness to deny Rambo's testimony. The only evidence in the record on this issue is the testimony of Rambo.

The "ALJ" found in favor of Metropolitan, granted the Modification, and terminated Rambo's benefits.

Rambo appealed to the Benefits Review Board.

The Benefits Review Board citing *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985) affirmed stating ". . . that a mere change

in a Claimant's wages could satisfy the change in conditions' requirement for modification."

B. The Ninth Circuit's Decision

The Ninth Circuit, in a *PUBLISHED* decision, filed June 24, 1991, reversed the decisions below and ruled that, ". . . a mere change in a Claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification. Rather a party seeking to modify an award must prove that the Claimant has undergone a change in his physical condition."

The Court noted that ". . . [Metropolitan] relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in the Claimant's wages could satisfy the 'change in conditions' requirement of 33 U.S.C. § 922."

The Ninth Circuit stated with approval that the *Fleetwood* dissent pointed out that, ". . . beginning with the first opinion dealing with the question, [*McCormick, supra*] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term 'change in condition' in (33 U.S.C. § 922) to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added by the Ninth Circuit).

The Ninth Circuit also noted that its holding on the issue in this case is supported by the authority in the First and Fifth Circuits.

Only the Solicitor's Office, on behalf of the Director OWCP, filed a Brief in Opposition to Rambo's appeal to the Ninth Circuit. After the decision of the court in Rambo's favor, the Solicitor filed a Petition For Re-Hearing. On the last page of that Petition the Solicitor

virtually conceded that Metropolitan's Application For Modification should be denied in the interest of ". . . Justice under the Act." The Solicitor noted:

> "6. Rambo has also contended throughout that the circumstances of the parties' agreement to the 1983 award's terms included representations that the award would not be modified (at least not downwards). Modification may be denied, despite an adequate demonstration that one of the statutory conditions for it exists, where changing the award would not "render justice under the Act." *McCord v. Cephas*, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976). In addition, the circumstances alleged by Rambo could be construed to effect an express waiver of the employer's right to seek modification of the 1983 award under Sec. 22 [*sic*]. Accordingly, Rambo's contention warrants full consideration."

ARGUMENT AND AUTHORITIES

Rambo contends that the threshold burden of proof for a party who seeks section 922 Modification, is a showing that the injured worker's physical condition has changed following the Award. After this prerequisite has been met, it is proper to consider other evidence on the issue of earning capacity.

Rambo admittedly suffered a serious injury that produced a, ". . . permanent partial disability equivalent to 22 1/2% of the whole person."

At the Formal hearing, the employer produced no evidence of a change in Rambo's physical condition. The only evidence produced at trial on the issue of physical condition was the testimony of Rambo. He testified that his physical condition was the same as it was at the time of the Award.

The Ninth Circuit in the case below held that,

> "Under our cases, a mere change in claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added by Ninth Circuit).
>
> For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages — without proof of a change in his physical condition — was not sufficient to satisfy the 'change in conditions' requirement of 33 U.S.C. § 922. *See id.* at 86 (rejecting the petition for modification because it was not based upon 'a *change in physical condition*,'

> but rather upon the claimant's changed earnings. . . ." (emphasis added by Ninth Circuit).

The decision below emphasizes that, ". . . the *PARTY* seeking to modify an award . . ." has the burden of showing a change in the employee's physical condition. It is respectfully submitted that any other interpretation of the expression "change in conditions" would permit modification of awards based upon a mere change in the business cycle, such as in the great depression, or, after a period of rapid inflation, either of which would have a dramatic effect on worker's earnings.

Furthermore, inevitably due to the aging process, it is predictable that the worker's earnings will deteriorate. In *Rizzi v. The Four Boro Contractor Corp.* (1974) 1 BRB 130, the Benefit's Review Board faced this precise situation. The injured worker sought permanent total disability by way of a Section 922 Modification. The Board denied modification and stated:

> "The Term, 'change in condition', means alteration of the physical condition of the employee caused by the accident." Citing *Bay Ridge Operating Co. v. Lowe*, 14 F. Supp. 280 (S.D. N.Y. 1936)

The factual situation in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933) was the same. During the depression the injured worker sought modification and the Ninth Circuit refused relief unless there was a change in the worker's "physical condition."

It is respectfully submitted that in the venue of Longshore Workers' Compensation, sixty years of experience with the "*McCormick* Rule" has served the *PARTIES* well.

Petitioner asks this Court to open the pandora's box of permitting modification of awards on the mere showing of a change in earnings. Petitioner states that, "The Ninth Circuit's Ruling is neither sensible nor consistent with the statutory scheme." It is wondered how sensible Petitioner will think its scheme of things is when injured workers such as *McCormick* and *Rizzi* file "naked" modifications based solely on reduced earnings? Furthermore, the record in the case below does not raise the "retraining" or "reemployment efforts" that petitioner attempts to address to this Court. The Application For Modification filed by Metropolitan was a "naked" petition supported only by Rambo's earnings subsequent to the Award. There is no evidence of the employer's "retraining" or "reemployment efforts" in the record below. Without such a record, it is respectfully submitted that the question Metropolitan seeks the Court to review is NOT ripe for decision.

Finally, as the Ninth Circuit pointed out, Petitioner relies solely on *Fleetwood, supra.* Under the facts of the case at bar, an application of *Fleetwood*, permitting modification merely on a showing of post award earnings encourages:

> 1. The employer to stipulate to an award, wait for the appropriate business cycle and inflation to justify a downward modification; or,
>
> 2. The injured worker to stipulate to an award, wait for the appropriate business cycle and reduced earnings to justify an upward modification.

It is respectfully submitted that this aberration was exactly what *McCormick* sought to avoid and must not be permitted.

CONCLUSION AND PRAYER

1. Sound policy underlies the rule announced by the Ninth Circuit in 1933 and affirmed in the case at bar, that ". . . a party seeking to modify an award must prove that the Claimant has undergone a change in his physical condition. . ." in order to satisfy the "change in conditions" required by 33 U.S.C. § 922.

2. The "Question Presented" by "Metropolitan" in its Petition For Writ of Certiorari is **NOT** the question decided by the Ninth Circuit in the decision below.

3. The most efficient manner for this Honorable Court to affirm the precedent first announced in 1933 and followed in the decision below, is to simply deny this Petition for Writ of Certiorari.

Therefore, Respondent prays that the Court deny Metropolitan's Petition For Writ of Certiorari because this case presents no issue appropriate for the Court's review, and because the lower Court's holding was not in error.

DATED: November 30, 1994.

Respectfully submitted,

THOMAS J. PIERRY
Counsel of Record

PIERRY & MOORHEAD

Attorney for Respondent
JOHN RAMBO

APPENDIX A

EXCERPTS FROM EMPLOYER'S APPLICATION FOR MODIFICATION §922

Law Offices James J. Wood
3441 East Broadway
Long Beach, California 90803
Telephone: 213-434-5703
Attorney for Employer

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS

JOHN D. RAMBO,
Claimant,
vs.
METROPOLITAN STEVEDORE COMPANY,
PERMISSIBLY SELF-INSURED,
Employer.

CASE NO: 18-6945 (83-LHC-242)

EMPLOYER'S APPLICATION FOR MODIFICATION §922

COMES NOW the employer by this Application to modify the previous Compensation Order of the Department of Labor filed December 6, 1983.

STATISTICAL DATA

Claimant: John D. Rambo
Injury Date: September 9, 1980
Birth Date: April 11, 1945
Social Security No: 547-64-2169
Employer No: C8000144

Pre-Injury Wage: $534.38
Benefit Rate: $356.26
Wage Loss: $124.24 per week
Benefit Rate: $80.16
Special Fund Started: December 1, 1983

STATEMENT OF FACT

This matter came on before an Administrative Law Judge who issued a decision which was converted into a Compensation Order by the Department of Labor filed December 6, 1983. That Compensation Order provided that the claimant, as a result of the injury herein, sustained a weekly wage loss of $120.24 per week providing for a compensation rate of $80.16 per week. The employer paid the first 104 weeks and the claimant has been getting paid by the Special Fund in the interim.

The employee's current earnings are documented by Pacific Maritime Association records, enclosed herein as Exhibit B. Exhibit A represents the calculations for the period covering the week ending March 12, 1988 through the week ending March 4, 1989. This 52 week period demonstrates that the employee earned $78,271.05 for an average weekly wage of $1,505.21. This is almost 300% of the employee's pre-injury average weekly wage demonstrating that he is not entitled to a wage loss of any kind at this time and that he has no economic disability as a result of this injury.

APPLICATION FOR MODIFICATION

The employer respectfully requests that all compensation payments being made through the Special Fund be terminated immediately. There is prima facie evidence presented here to demonstrate that this employee does not have a wage loss

now and he has not had a wage loss for the last year or two.

* * *

In this case we can clearly show simply by the earnings information alone that for the time frame between the issuance of the previous Compensation Order and the present earnings of the claimant there can be no reasonable argument made suggesting that pay increases in the interim would be an adequate explanation for the increase. There is no basis whatever for the pay increases to support a 300% increase in earnings as is demonstrated by the information provided.

WHEREFORE, employer respectfully requests that a Stay Order issue immediately. Thereafter, if the claimant failed to show good cause why a Compensation Order terminating benefits should not issue, then an Order terminating benefits should issue relieving the Special Fund of further liability and relieving the employer of any potential assessments for monies paid by the Special Fund in this case. Lastly, if the Department of Labor either refuses to act upon this Application for Modification or alternatively if it considers itself to be powerless to act for any reason, it is then requested that the matter be referred promptly to the Office of Administrative Law Judges. An LS-18 is enclosed for that purpose.

* * *

Respectfully submitted,

/s/ JAMES J. WOOD
JAMES J. WOOD
Attorney for the Employer

APPENDIX B

EXCERPTS FROM CLAIMANT'S TRIAL BRIEF

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834-2691 or 775-8348
Attorneys for Claimant

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

JOHN D. RAMBO,
Claimant,
-vs-
METROPOLITAN STEVEDORE COMPANY,
Employer,
SELF-ADMINISTERED.

OWCP NO.: 18-6945
CASE NO.: 83-LHC-242

CLAIMANT'S TRIAL BRIEF

I.

FACTS

Claimant was injured on September 9, 1980 while in the employ of Metropolitan Stevedore Company. The employer voluntarily provided medical and temporary total disability benefits. The claim was set for a Formal Hearing before His Honorable Judge James J. Butler.

At the Formal Hearing:

> "The parties [have] STIPULATED as follows (29 C.F.R. Section 18.51): . . .
> 6. That the employee sustained an overall current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability. . . ."

On November 28, 1983 His Honorable Administrative Law Judge William J. Butler issued his Decision and Order. . . .

* * *

II.

Claimant objects to the introduction of any evidence by the employer at this Formal Hearing and respectfully requests an order dismissing these proceedings. Said objection is based upon the following grounds:

* * *

B. Modification of an Award based on a change in condition can only be granted where the claimant's physical condition has improved following the entry of the Award. The employer has offered and has no evidence concerning claimant's physical condition since the entry of the Award in 1983.

III.

ARGUMENT

* * *

B. Since 1933 the 9th Circuit has, . . . "without wavering thereafter . . . uniformily interpreted the term 'change in condition' in Section 22 of the Longshoreman's and Harbor Workers' Compensation Act (LHWCA), 33 USC Section 922 (1982), to refer exclusively to a change in the physical condition of the employee receiving compensation."

> Dissenting opinion — Judge Warriner
> *Fleetwood v. Newport News*, 18 BRBS 12 at page 33 (4th Cir. 1985)
> Citing: *McCormick v. U.S. Employees Compensation Commission*, 64 F 2nd 84 (9th Cir. 1933)

This is still the law of this circuit. It will govern the case at bar until overturned by the 9th Circuit or the Unitd States Supreme Court.

It is respectfully submitted that this Honorable Court is duty bound to apply the law of the 9th Circuit and dismiss this proceeding on the ground that the employer has failed to produce any evidence of change in condition.

* * *

WHEREFORE, claimant respectfully requests that this Court dismiss these proceedings or in the alternative to continue this matter to the calendar of Judge James Butler.

Respectfully submitted,
MAGANA, CATHCART,
McCARTHY & PIERRY
By: _____
THOMAS J. PIERRY
Attorneys for Claimant

EXCERPTS FROM TRANSCRIPT OF HEARING

BEFORE THE
UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:
JOHN RAMBO,
Claimant,
vs.
METROPOLITAN STEVEDORE COMPANY,
Self-Administered,
Employer.

Case No: 83-LHC-242
18-6945

Pages: 1-48

Place: San Pedro, California

Date: October 15, 1990

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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:
JOHN RAMBO,
Claimant,
vs.
METROPOLITAN STEVEDORE COMPANY,
Self-Administered,
Employer.

Case No. 83-LHC-242
OWCP No. 18-6945

San Pedro Municipal Building
Room 611-A
638 South Beacon Street
San Pedro, California

Monday,
October 15, 1990

The above-entitled matter came on for hearing, pursuant to notice, at 2:25 p.m.

BEFORE: DANIEL L. STEWART
Administrative Law Judge

APPEARANCES:

On behalf of the Claimant:

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301 North Avalon Boulevard
Wilmington, California

On behalf of the Employer:

JAMES J. WOOD, Esq.
3441 East Broadway
Long Beach, California 90803

INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
John Rambo	27	38	43	—

* * *

[Page 3, lines 1 to 11]

PROCEEDINGS

JUDGE STEWART: This is a hearing involving a claim for compensation under the Longshore and Harbor Workers' Compensation Act. The hearing is being held in San Pedro, California, at 2:25 p.m., on October 15, 1990.

The case number is 83-LHC-242 and the OWCP number is 18-6945. This hearing is being held pursuant to the notice of hearing dated July 12, 1990.

The case has been assigned to myself, Daniel L. Stewart, to hold the hearing and to decide the case.

* * *

[Page 4, lines 13 to 25]

OPENING STATEMENT

MR. PIERRY: The trial brief that I have submitted lays out what the Claimant's position is. But for the record, so there is no misunderstanding and there is no opportunity at a later time for a court to interpret the Claimant having waived

any objections to this hearing or the introduction of evidence, let me briefly summarize my trial brief.

Your Honor, may I incorporate my trial brief into the record at this point?

JUDGE STEWART: Okay. That will be fine.

MR. PIERRY: It will be Claimant's, then, first in order.

* * *

[Page 5, lines 15 to 17]

MR. PIERRY: The Claimant requests the Court to terminate these proceedings and issue an order dismissing these proceedings on essentially two grounds.

* * *

[Page 8, lines 4 to 25 through Page 9, lines 1-6]

The second argument that I have is — the second objection — let me clean that up. Just so the record is clear, Your Honor, I want it on the record that the Claimant formally objects to the introduction of any evidence at this hearing on the guise of a 922 petition by the Employer for the reasons stated.

In addition to that, the Employer has not submitted any medical. I make an offer of proof now that they have no current medical. It is the Claimant's condition [contention] that in this circuit, in the Ninth Circuit, since 1933 in the *McCormick* case, the Ninth Circuit has held that the change of condition to justify a 922 modification has to be predicated upon a change on medical condition.

They don't have that. There is a Fourth Circuit decision, *Fleetwood*, which was recently decided, which I have cited, and I have a copy. I would be happy to give it to the court. There is a strong dissenting opinion, by the dissenting judge in the Fourth Circuit, that indicates that there are many reasons why you have to have the medical basis for a 922 petition.

Otherwise, every time the economy hiccups, you are going to either have a line of longshoremen filing 922 motions or the employer is going to be filing 922 motions. It has nothing to do with the change in the economic condition of the individual based upon his medical at the time of the finding, the time that they agreed or an order was entered establishing his disability, but rather it is due to economic conditions.

* * *

[Page 13, lines 2 to 5 and lines 21 to 25 through Page 14, lines 1 to 11]

MR. PIERRY: I know this has to end, Your Honor. It can't go on forever. If I may just quickly summarize and respond.

JUDGE STEWART: Okay.

* * *

[B]ut as far as the authority in this circuit for a 922 modification as to change of condition, the Ninth Circuit has religiously and without fail, since 1933, followed the *McCormick*, which held that in order to have a 922 modification, the condition precedent is that there was a physical change in the Claimant's condition since the time of the award.

The only decision that he can point to on that level is the Fourth Circuit *Fleetwood* decision, which is a vigorously dissented decision in the Fourth Circuit, with a vigorous dissent by one judge, who I greatly admire, Your Honor.

I think you are bound by the Ninth Circuit. We are sitting in San Pedro, California, and until the Ninth Circuit or the United States Supreme Court changes that decision, then I think you are bound by that decision.

* * *

[Page 26, lines 15 to 20]

JUDGE STEWART: Yes. You want to add it in here. Okay. (Pause.) Thank you.

Does that complete your case or are you going to have some testimony?

MR. WOOD: I would like to call the Claimant, Your Honor.

* * *

[Page 27, lines 1 to 21]

Whereupon,

JOHN RAMBO

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

JUDGE STEWART: Go ahead, Mr. Wood.

MR. PIERRY: Your Honor, again for the record, the Claimant objects to introduction of any evidence, including this testimony, for reasons already stated on the record.

JUDGE STEWART: Right. Right. Because you don't think the record should be reopened for any reason.

MR. PIERRY: That is right.

JUDGE STEWART: Okay. Go ahead, Mr. Wood.

DIRECT EXAMINATION

Q BY MR. WOOD: Would you please state your full name.

A John D. Rambo.

Q Mr. Rambo, what is your occupation?

A Longshoreman.

Q Were you so occupied in 1980, when you sustained an injury while working for Metropolitan?

A Yes.

* * *

[Page 28, lines 6 to 7]

Q In what capacity?

A Crane operator.

* * *

[Page 31, lines 4 to 6]

Q Now, currently, they show that most of your hours, the bulk of your hours, are as a gantry crane operator?

A Yes.

* * *

[Page 38, lines 23 to 25 through Page 39, line 1]

Q Has your physical condition since 1983 gotten better, or worse, or stayed the same?

A I would say at least the same, because I still can't do certain things.

* * *

[Page 41, lines 2 to 24]

A If we work tonight, we get eight hours — nine hours on the print. And if I go out — say I am 10 guys out and I don't get out tonight, tomorrow night I will be on, say, zero hours. This guy is on nine. Then I take a job.

Then I come back. I check in on nine, but he is on the board before me and he would get the job first.

Q Let me take you back to 1983. Your case was set for hearing before the United States Department of Labor, on Wilshire Boulevard. Do you remember that?

A Yes.

Q And you drove down with your attorney at the time, whose name was —

A Goldwater.

Q Goldwater. And after you checked in, you went down to the cafeteria, and you sat at one table and Mr. Goldwater and Mr. Wood sat at another table. Is that right?

A Yes.

Q Tell the Court what happened after that?

A They called me over there after Goldwater and Wood were talking, and Goldwater said that we were going to get $80 — say, $80 and some change a week. And I looked at him and Wood said — Goldwater said, "This is your settlement." And then, Wood said, "You will get this as a settlement."

* * *

[Page 42, lines 16 to 25 through Page 43, lines 1 to 11]

THE WITNESS: He told me for life.

MR. PIERRY: This is percipient testimony.

JUDGE STEWART: Mr. Wood.

MR. WOOD: It is being offered for the truth of the matter. This is what makes it hearsay. Mr. Goldwater could have told him anything. If he wants to disagree with Mr. Goldwater —

JUDGE STEWART: He said Mr. Wood.

MR. WOOD: Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I guess.

JUDGE STEWART: Well, he said he heard you say it. He has a right to testify as to what he heard you say.

Go ahead.

MR. PIERRY: That is all I have, Your Honor.

JUDGE STEWART: Any redirect?

REDIRECT EXAMINATION

Q BY MR. WOOD: Were you aware at all times that I was the attorney for Metropolitan, while your case was in litigation?

A Only when we went to court, as far as I remember.

* * *

[Page 43, lines 21 to 25, Page 44 lines 1 to 25 through Page 45, lines 1 to 8]

A I don't recall that. All I know is you said for life and Goldwater wrote it down on a piece of paper, and you two were talking about it.

Q He never told you about the provisions in the Act that provided for modification, in fact that you could modify it and get more money if you later got worse? He never discussed that with you?

A I don't know if he did or not. All I know is that it was said that I had it for life.

JUDGE STEWART: By Mr. Wood?

(Brief pause off the record.)

JUDGE STEWART: The answer was by Mr. Wood and by Mr. Goldwater.

MR. WOOD: Well, let's go back and hear it. I want to hear it myself, if I may, because the machine stopped running.

Q BY MR. WOOD: Who told you that you would have this payment for life?

A Both of you.

Q Who is both of us?

A You and Goldwater.

Q I told you that you would have this payment for life?

A We were sitting there in the cafeteria. You were on the left. You called me over later, and you were talking

about what I am going to get a week. You said, "You will get this for life." Goldwater was saying — I looked at him and he said, "Well, this is the rest of your life."

And he wrote it down in the figures. "This is what you get two weeks, and you will get this for the rest of your life."

Q And who said that?

A Goldwater said that, and you said, "For your life."

Q I said, "For your life"? I told you that?

A You were saying — between — now you are getting me confused — between both of you that I was supposed to get this for life.

* * *

[Page 45, lines 14 to 17]

Q Well, don't you think that would be germane to the discussion as to whether you are going to get something for life or not, if it could be modified?

A I understood I had it for life.

* * *

[Page 46, lines 1 to 4]

A Yes, with you, yes.

Q With me?

A Well, I mean, we were there together. You were there with —

* * *

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO
Petitioner,
v.
Director, Office of Workers' Compensation Programs; Metropolitan Stevedore Company,
Respondents.

No. 92-70783
OWCP No. 18-6945
BRB No. 91-1538

OPINION

Petition for Review of an Order of the Benefits Review Board

Argued and Submitted
March 14, 1994 — San Francisco, California

Filed June 24, 1994

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

Opinion by Judge Leavy

---

* The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

OPINION

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for benefits because he was presently working at a job that paid him $1,505.21 per week — almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. §922.[1] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's physical condition can justify an award modification. A change in a claimant's wages, training, skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

---

[1] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

Analysis

[1] Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages — without proof of a change in his physical condition — was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. §922. *See id.* at 86 (rejecting the petition for modification because it was not based upon "*a change in physical condition*," but rather the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. §922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. *See id.* at 1235 (Warriner, J., dissenting) (noting that "[b]eginning with the first opinion dealing with the question, [*McCormick*,] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. §922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent. *United States v. Lewis*, 991 F.2d 524, 526 n.1 (9th Cir.) *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*; and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED.

(5)

No. 94-820

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed November 7, 1994
Certiorari Granted January 13, 1995

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TABLE OF CONTENTS
JOINT APPENDIX

Page

Chronology of Events 1

Administrative Law Judge's Decision and Order Awarding Benefits 2

Employer's Application for Modification* 7

Claimant's Response to Application for Modification* 11

Memorandum of Administrative Conference* 16

Transcript of Hearing on Modification 20

Administrative Law Judge's Decision and Order Granting Modification 63

Decision and Order of the Benefits Review Board 70

Opinion of the United States Court of Appeals for the Ninth Circuit, 28 F.3d 86 (9th Cir. 1994) 75

Order of the United States Court of Appeals for the Ninth Circuit denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* 79

---

* The three items identified by the asterisk were not included in the record submitted by the Benefits Review Board to the United States Court of Appeals for the Ninth Circuit. They comprise the pleadings submitted to and conclusions reached by the Department of Labor's Office of Workers' Compensation Programs. Petitioner and Respondent Rambo did not agree that each item should be included in the Joint Appendix. The Clerk suggested inclusion, accompanied by this explanation.

CHRONOLOGY OF EVENTS

November 28, 1983	Decision and Order Awarding Benefits Issued
October 30, 1989	Employer's Application for Modification Filed
December 8, 1989	Administrative Response to Modification Issued
May 29, 1991	Decision and Order Granting Modification Issued
November 9, 1992	Decision and Order of Benefits Review Board Affirming Modification Issued
June 24, 1994	Opinion of the United States Court of Appeals for the Ninth Circuit Reversing Modification Issued
August 10, 1994	Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing Issued
November 7, 1994	Petition for Writ of Certiorari Filed
January 13, 1995	Petition for Writ of Certiorari Granted

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California 94105

Case No. 83-LHC-242

OWCP No. 18-6945

IN THE MATTER OF JOHN RAMBO, CLAIMANT

v.

METROPOLITAN STEVEDORE COMPANY
SELF-INSURED EMPLOYER

Before: JAMES J. BUTLER, Administrative Law Judge.

DECISION AND ORDER – AWARDING BENEFITS

I. *Statement of the Case*

A. Pertinent statutes and regulations.

The instant claim was made under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter referred to as "the Act," and the regulations implementing the Act contained in Title 20, Code of Federal Regulations (C.F.R.), Parts 701 and 702. All code section references are to 33 U.S.C.A. (1970 ed. and Supp. V, 1975) unless otherwise indicated.

B. Stipulations.

The parties have stipulated as follows (29 C.F.R. § 18.51):

1. The employer and employee on all occasions herein were covered by the provisions of the Act. The employee had both an appropriate situs and status on the occasion of these events and the employer is a maritime employer.

2. The claimant, John Rambo, born April 11, 1945, bearing Social Security No. 547-64-2169, was employed as a longshoreman (frontman) by Metropolitan on September 9, 1980, on which occasion he sustained an injury arising out of and occurring in the course of his employment to his back and leg.

3. On the occasion of said injury, the employee's average weekly wages were $534.38 per week which the parties stipulate for all purposes was sufficient to produce a compensation rate of $356.26 per week for temporary total disability.

4. That the first lost time from work occurred September 10, 1980, and the employee was paid temporary total disability at the weekly rate of $356.26 per week for the period September 10, 1980 through and including November 22, 1981, in the total sum of $22,342.58, which sum fully satisfied all claims of temporary total disability.

5. That the employee's condition became permanent and stationary November 16, 1981, as indicated by Jack Paschall, Jr., M.D., as a result of an examination of November 16, 1981, outlined in a report dated November 30, 1981. That the date of November 16, 1981, is the

appropriate date for the commencement of any permanent partial disability payments as are to be made herein.

6. That the employee sustained an overall current permanent partial disability equivalent to 22½% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

7. The parties stipulate that all appropriate forms and notices were timely and properly filed including a timely controversion consistent with the positions of the parties and there is no basis for and no claim for penalties and/or interest in these proceedings.

8. That the claimant's attorney has rendered services both at the informal level and the formal level some of which directly relate to representation of the claimant wherein no controversion existed and some of which arise out of the dispute between the claimant and the employer. That in consideration of the documented time schedule and division of the services herein provided by claimant's attorney, claimant's attorney is entitled to separate fees from the claimant and the employer as follows:

a. As a lien on the employee's compensation, $1,000.00

b. Payable by the employer over and above the compensation otherwise called for herein the sum of $2,000.00 which sum fully satisfies all claims of fees for all purposes against this employer.

9. That all medical treatment has been provided by the employer herein and there are no claims for medical

costs and/or related items outstanding. Any incidental billings as may remain will be adjusted by the parties between them for a full resolution of such items.

10. That the claimant is entitled to permanent partial disability based on the compensation rate equivalent to his stipulated wage loss or $80.16 per week commencing November 16, 1981, and continuing thereafter (subject to the employer's seeking Special Fund relief and all other provisions of the Act) with said payments to continue indefinitely less a lump sum payment of $1,000.00 for the attorney fees referred hereinabove.

11. That these Stipulations resolve all issues between the parties and the parties respectfully request Award issue in accordance therewith subject to the limitations of the Act.

II. *Findings and Conclusions – §908(f)*

The evidentiary hearing in this matter was directed toward issues of fact pertaining to the requirements of § 908(f) of the Act. An explanation of the intent and purposes of this section is no longer necessary. The claimant is not directly concerned and the employer is well acquainted with its provisions. It should suffice to say only that this employer is clearly qualified for the statutory relief it seeks by virtue of claimant's documented pre-existing disability attributable to previous low back injuries and the permanent residuals of those events (see, in particular, Joint Exhibits 1 & 2). The whole record presented fully supports employer position that it is eligible for a limitation of its liability under the circumstances

brought forward. The claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent subject injury alone. Accordingly, the employer shall provide compensation for one hundred and four weeks only. After payment of the one hundred and four week period, the claimant shall be paid the remainder of the compensation due him out of the Special Fund established for this and other purposes in § 944 of the Act. The employer shall, however, continue to provide the medical benefits required by § 907 of the Act.

ORDER

The parties hereto, now including the Director, OWCP, on account of the liability of the Special Fund, shall proceed in a manner consistent herewith and the terms and provisions of the Act and applicable regulations.

/s/ James J. Butler
JAMES J. BUTLER
Administrative Law Judge

Dated: Nov. 28, 1983
San Francisco, California

JJB:scm

LAW OFFICES JAMES J. WOOD
3441 East Broadway
Long Beach, California 90803
Telephone: 213-434-5703
Attorney for Employer

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMPENSATION PROGRAMS

JOHN D. RAMBO, Claimant, vs. METROPOLITAN STEVEDORE COMPANY, PERMISSIBLY SELF-INSURED, Employer.	CASE NO: 18-6945 (83-LHC-242) EMPLOYER'S APPLICATION FOR MODIFICATION §922

COMES NOW the employer by this Application to modify the previous Compensation Order of the Department of Labor filed December 6, 1983.

STATISTICAL DATA

Claimant: John D. Rambo

Injury Date: September 9, 1980

Birth Date: April 11, 1945

Social Security No: 547-64-2169

Employer No: C8000144

Pre-Injury Wage: $534.38

Benefit Rate: $356.26

Wage Loss: $124.24 per week

Benefit Rate: $80.16

Special Fund Started: December 1, 1983

STATEMENT OF FACT

This matter came on before an Administrative Law Judge who issued a decision which was converted into a Compensation Order by the Department of Labor filed December 6, 1983. That Compensation Order provided that the claimant, as a result of the injury herein, sustained a weekly wage loss of $120.24 per week providing for a compensation rate of $80.16 per week. The employer paid the first 104 weeks and the claimant has been getting paid by the Special Fund in the interim.

The employee's current earnings are documented by Pacific Maritime Association records, enclosed herein as Exhibit B. Exhibit A represents the calculations for the period covering the week ending March 12, 1988 through the week ending March 4, 1989. This 52 week period demonstrates that the employee earned $78,271.05 for an average weekly wage of $1,505.21. This is almost 300% of the employee's pre-injury average weekly wage demonstrating that he is not entitled to a wage loss of any kind at this time and that he has no economic disability as a result of this injury.

APPLICATION FOR MODIFICATION

The employer respectfully requests that all compensation payments being made through the Special Fund be terminated immediately. There is prima facie evidence presented here to demonstrate that this employee does

not have a wage loss now and he has not had a wage loss for the last year or two.

It is requested that an interim Stay Order issue, terminating the benefits temporarily while the claimant responds to this Application for Modification. In the absence of good cause being demonstrated to the contrary, it is requested that the Department of Labor issue a new Compensation Order completely terminating the previous Compensation Order and providing for the discontinuance of all payments pursuant to §922 of the Act.

CONCLUSION

The Department of Labor has indicated in the past that they are not inclined to issue Stay Orders or to issue Compensation Orders terminating previous Compensation Orders. In the absence of any affirmative action by the United States Department of Labor, the matter will normally sit dormant while payments are continuing to be made on an improper basis. Failure of the Department of Labor to act in accordance with the provisions of the Longshore and Harbor Workers' Compensation Act may cause the employer to seek adjustment in all Special Fund assessments for monies paid beyond the time when the employer submitted its Application for Modification. The employer would contend in that instance that a Stay Order and/or an Order terminating the benefits should have issued and assessments made against the employer for monies paid beyond that date are improper since the payments should not have been made.

In this case we can clearly show simply by the earnings information alone that for the time frame between the issuance of the previous Compensation Order and the

present earnings of the claimant there can be no reasonable argument made suggesting that pay increases in the interim would be an adequate explanation for the increase. There is no basis whatever for the pay increases to support a 300% increase in earnings as is demonstrated by the information provided.

WHEREFORE, employer respectfully requests that a Stay Order issue immediately. Thereafter, if the claimant failed to show good cause why a Compensation Order terminating benefits should not issue, then an Order terminating benefits should issue relieving the Special Fund of further liability and relieving the employer of any potential assessments for monies paid by the Special Fund in this case. Lastly, if the Department of Labor either refuses to act upon this Application for Modification or alternatively if it considers itself to be powerless to act for any reason, it is then requested that the matter be referred promptly to the Office of Administrative Law Judges. An LS-18 is enclosed for that purpose.

We want to emphasize that conferences before the Department of Labor will serve no purpose. If the Department takes the position that it has no power to act in any way to modify the previous Compensation Order, then it is apparent that the parties appearing before the Department of Labor at a conference will simply delay matters without any hope of productive result following that delay.

Respectfully submitted,

/s/ James J. Wood
JAMES J. WOOD, Attorney for the Employer

MAGANA, CATHCART, McCARTHY & PIERRY
301 North Avalon Boulevard
Wilmington, California 90744
834-2691 or 775-8348

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMPENSATION PROGRAMS

JOHN RAMBO,

Claimant,

-vs

METROPOLITAN STEVEDORE; SELF-INSURED,

Defendants.

_____/

CASE NO.: 18-6945

(83-LHC-242)

CLAIMANT'S PRELIMINARY RESPONSE TO APPLICATION FOR MODIFICATION OF AWARD PURSUANT TO SECTION 922

I. BACKGROUND

On October 30, 1989, the employer filed an Application for Modification of a Compensation Order which had been entered on November 28, 1983. In that Application, the employer not only seeks Modification of the prior Compensation Order, but essentially asks for such Modification on a summary basis. Without citing authority, the employer asks the Department of Labor to strike the Order without permitting the claimant an opportunity to be heard and/or submit evidence or argument.

II. ISSUES

1) Should the Department either vitiate the prior compensation order or issue an Order terminating benefits on the basis of the Application filed on October 30, 1989?

Employer's counsel concedes in its Application that it is not the Department's policy to summarily adjudicate Petitions for Modification of Awards. Furthermore, the employer cites no authority which would authorize such an extraordinary remedy. It is respectfully submitted that the employers "modest proposal" is absurd and should be denied.

2) Should this Application for Modification of Award proceed in an orderly fashion, first to Informal Conference?

The employer argues that it will be prejudiced unless this matter is brought to a Hearing before an Administrative Law Judge yesterday. The reason that the employer apparently feels it will be prejudiced is that the law and the facts of the case are so patently clear that only one decision could possibly be rendered on the Application for Modification. Again, the employer cites no authority.

Given the employer's one sided and apparently preliminary evaluation of the factual and medical issues involved in this Modification of a prior Compensation Order, it is apparent why the employer wishes to rush to judgment. Modification pursuant to Section 922 of the Longshore and Harbor Workers' Compensation Act is not nearly as simple as is alleged by counsel for the employer.

In *Fleetwood vs. Newport News Shipping*, 18 BRBS 12 (CTR) (4th Cir. 1985) both the majority and dissent review the issues involved in a Modification of an Award.

In this case both the majority opinion and the dissent agreed that an award of compensation might only be modified by showing a substantial change in overall wage earning capacity. It should be noted that this is the only thing that the majority and the dissenting opinion agreed upon.

The dissenting opinion concluded that as a predicate to modifying an award there must be a change in the physical condition of the claimant. The dissent relied upon fifty years of prior court decisions, including a 9th Circuit Court of Appeal Decision. That decision is *McCormick Steamship Company vs. U.S. Employees Compensation Commission*, 62 F. 2d 84 (9th Cir. 1933).

While the majority never specifically ruled that a change in physical condition is not a condition precedent to modifying a prior award, it holds that one of the factors to be considered in determining whether there has been a change in wage earning capacity will be the actual post-award earnings of the claimant. Whether or not this court considered the impact of its ruling on the overall policy of the Act to encourage rehabilitation is nowhere reported.

Regardless of whether the Ninth Circuit, *McCormick* approach which requires as a condition precedent to a modification, a substantial change in physical condition; or, whether one of the factors to be considered in a modification proceeding will be post award earnings, it is

clear that the mere assertion of increase earnings is not dispositive of a Section 922 proceeding.

It is respectfully submitted that before this award is modified claimant is entitled to a hearing on the issues presented.

III. CLAIMANT'S CONTENTIONS

1) Claimant contends that as a precedent to modifying a Compensation Order, medical evidence must be submitted to showing that there has been a change in the employee's physical condition which has affected his earning capacity;

2) Claimant contends that his physical condition has deteriorated since the Award;

3) Claimant contends that the economic situation on the waterfront has changed since his award. It is this change which has caused an increase in his earnings not an increase in his earning capacity;

4) Claimant contends that his actual post-award earnings would be substantially higher due to increased economic opportunity had it not been for the injury which forms the basis of his compensation award;

5) Claimant contends that it will present both medical and economic evidence to support his contention that there has been no change in claimant's wage earning capacity since the date of the award. If anything claimant has been deprived of the opportunity to earn greater wages because of this injury.

THEREFORE, it is respectfully requested that the employer's Application for Modification of Compensation Award be denied.

Respectfully submitted,

MAGANA, CATHCART, McCARTHY
& PIERRY

By: /s/ Thomas Pierry
THOMAS J. PIERRY

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

MEMORANDUM OF INFORMAL CONFERENCE
(Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

1. Claimant
John D. Rambo

2. OWCP #
18-06945

3. Employer
Metropolitan Stevedore Co.

4. Carrier/Employers No:

5. Insurance Carrier
Self Insured

6. Date of Conference
(month, day, year
11-29-89

7. Date of Injury
(month, day, year)
9/9/80

8. Appearance:
X Claimant present

_ Claimant not present

For Claimant:
Thomas J. Pierry, Esq.

For Employer/Carrier
James Wood, Esq.

Issues:

a. Section 922 Modification

9. The claimant sustained/alleges an accidental injury on the date in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C. 901 etc seq.) or an extension thereof, resulting in the following injury(ies): to the low back.

10. Prior ALJ hearing was held and a Decision and Order was issued on 11/28/83. The employer/carrier have paid compensation for this injury in the amount of $30,517.61 for the following periods: 9/10/80 to 11/30/83 and the special fund has paid permanent partial disability since 12/1/83.

11. Present Claim:

A. THERE HAS BEEN NO CHANGE IN THE CLAIMANT'S PHYSICAL CONDITION AS DEMONSTRATED BY MEDICAL EVIDENCE.

B. THE MEDICAL STATUS HAS IN FACT DETERIORATED.

C. THE ECONOMIC CONDITIONS HAVE CHANGED. THE CLAIMANT IS WORKING UNDER CONTRACT AND IS GUARANTEED 45 HOURS PER WEEK.

D. THE CLAIMANT WOULD BE EARNING SUBSTANTIALLY MORE IF IT WERE NOT FOR THE INJURY.

12. Employer/Carrier's Position:

A. THE CLAIMANT IS EARNING 300% OVER THE 1983 AVERAGE WEEKLY WAGE. WAGE INCREASES DO NOT ACCOUNT FOR THIS SUBSTANTIAL INCREASE. THE D&O OF 11/28/83 SHOULD BE VACATED. THE CLAIMANT IS NOT ENTITLED TO ADDITIONAL WAGE LOSS BENEFITS.

13. Average weekly wage (Sec.10) $534.48
    X As stipulated by parties
    _ As recommended by Examiner

14. Compensation rate (2/3 x AWW) $356.28

15. Claimant
    X Returned to work on
    _ Has not returned to work
    _ Did not lose time

16. Medical costs related to the injury
    X have been paid by the employer
    _ Have not been paid

Upon discussion of the issues involved among those present, together with due consideration to all information in the administrative file, the following recommendation is made.

RECOMMENDATION

IN *FLEETWOOD V. NEWPORT NEWS SHIPBUILDING & DRY DOCK CO.*, 16 BRBS 282 (1984), AFF'D 776.F.2d 1225, 18 BRBS 12 (CRT) (4TH CIR. 1985), THE BOARD HELD THAT EMPLOYER SHOULD NO LONGER HAVE TO COMPENSATE CLAIMANT WHEN THERE HAS BEEN A CHANGE IN CLAIMANT'S ECONOMIC CONDITION SO THAT THERE IS NO LONGER A LOSS IN WAGE-EARNINGS CAPACITY. ASSUMING A 5% PER YEAR INCREASE IN WAGES SINCE 1983, BASED ON THE AVERAGE WEEKLY WAGE THE CLAIMANT WOULD NOW BE EARNING $43,000 PER YEAR. MR. RAMBO HAS REPORTED THE FOLLOWING EARNINGS: 1984 $58,000; 1985 $71,000; 1986 $72,000; 1987 $68,000; 1988 $76,000. CLAIMANT NO LONGER HAS ANY WAGE LOSS. I RECOMMEND THAT THE PRIOR D&O OF 11/28/89 BE VACATED.

A DEMAND HAS BEEN MADE AND THE CARRIER IS CONSIDERING THIS DEMAND.

SUBSEQUENT TO THE CONFERENCE MR. PIERRY REQUESTED THAT THE ISSUE OF STANDING TO PURSUE A MODIFICATION BE ADDED. UNDER SECTION 22 AN EMPLOYER/CARRIER WHO HAS BEEN AWARDED SPECIAL FUND RELIEF IS SPECIFICALLY INCLUDED AS A PARTY IN INTEREST.

PLEASE ADVISE OF THE ACCEPTANCE OR REJECTION OF THESE RECOMMENDATIONS WITHIN 14 DAYS. THE CASE IS IN POSTURE FOR REFERRAL TO THE OALJ FOR A FORMAL HEARING.

ACTION BY EMPLOYER/CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payments, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

/s/ Raquel Torres
for
Edward B. Bounds
Claims Examiner

12/8/89
(Date this memorandum issued)

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
JOHN RAMBO,	)	
Claimant,	)	Case No. 83-LHC-242
vs.	)	OWCP No. 18-6945
METROPOLITAN STEVEDORE COMPANY, Self-Administered,	)	
Employer.	)	

[p. 3] PROCEEDINGS

JUDGE STEWART: This is a hearing involving a claim for compensation under the Longshore and Harbor Workers' Compensation Act. The hearing is being held in San Pedro, California, at 2:25 p.m., on October 15, 1990.

The case number is 83-LHC-242 and the OWCP number is 18-6945. This hearing is being held pursuant to the notice of hearing dated July 12, 1990.

The case has been assigned to myself, Daniel L. Stewart, to hold the hearing and to decide the case.

Will counsel for Claimant please identify himself for the record and state his name, address, and telephone number.

MR. PIERRY: Thomas James Pierry, 301 North Avalon Boulevard, Wilmington, California, 90744, (213) 834-2691.

JUDGE STEWART: Will counsel for the Employer please identify himself for the record and state his name, address, and telephone number.

MR. WOOD: James J. Wood, attorney, 3441 East Broadway, Long Beach, California, 90803, (213) 434-5703.

JUDGE STEWART: Any decision made in this case will be based solely on the record made here this afternoon. Any papers, documents, or exhibits previously submitted to or filed are not a part of the record as of this time.

[p. 4] Anyone wishing any such paper document or exhibit to become part of the evidence in this case will have to introduce it at the hearing here this afternoon.

I would prefer that all exhibits that are introduced into evidence at the hearing here this afternoon be given to the court reporter. I understand that is the procedure that you do follow here in this area, and that is the procedure which I want to follow here this afternoon.

Counsel will now be allowed an opportunity to make a brief opening statement if they so desire.

Mr. Pierry.

MR. PIERRY: Yes, Your Honor.

OPENING STATEMENT

MR. PIERRY: The trial brief that I have submitted lays out what the Claimant's position is. But for the record, so there is no misunderstanding and there is no opportunity at a later time for a court to interpret the Claimant having waived any objections to this hearing or the introduction of evidence, let me briefly summarize my trial brief.

Your Honor, may I incorporate my trial brief into the record at this point?

JUDGE STEWART: Okay. That will be fine.

MR. PIERRY: It will be Claimant's, then, first in order.

[p. 5] JUDGE STEWART: Okay.

(The document referred to was marked as Claimant's Exhibit No. 1 for identification and received into evidence.)

MR. PIERRY: Essentially, the Claimant requests the Court to dismiss these proceedings –

JUDGE STEWART: I take it you have no objection, Mr. Wood, do you?

MR. WOOD: To his trial brief?

JUDGE STEWART: Yes.

MR. WOOD: No, Your Honor. I have one of my own, plus exhibits.

JUDGE STEWART: Okay. Fine. Go ahead.

MR. PIERRY: The Claimant requests the Court to terminate these proceedings and issue an order discussing these proceedings on essentially two grounds.

In 1983, the parties appeared before Judge William Butler and settled this case. As the order that came out in early 1983 demonstrates, the parties stipulated in open court to all issues between Metropolitan Stevedore and the Claimant.

The exact language of the order that followed was in No. 6, where the parties have stipulated as follows, pursuant to 29 C.F.R. Section 18.51, No. 6:

[p. 6] "That the Employee sustained an overall – permanent partial disability equivalent to 22 1/2 percent of the whole person, which the parties recognize is an economic disability producing a weekly wage loss of $120.24 per week, with an equivalent compensation rate of $80.16 per week for permanent partial disability."

Then, Item No. 11:

"These stipulations resolve all issues between the parties, and the parties respectfully request that an award issue in accordance therewith, subject to the limitations of the Act."

The only issue that was submitted to Judge Butler was the issue of 8(f) relief for the Employer. On November 28, 1983, he issued an order granting the Employer's petition for 8(f) relief and memorializing the settlement between the parties.

The Employer, on October 30, 1989, filed a document entitled, "Employer's Application for Modification, Section 922."

I have cited the cases which basically hold that stipulations made by parties are binding upon parties who make them and that they cannot withdraw from the stipulation at this stage of the game.

What is more, I have of course cited *Clefstad* case and all the other cases, including *Sablowski*, which holds [p. 7] that contingent awards are not contrary to the statute, and the Deputy Commissioner has power to approve a settlement agreed on which is properly conditioned.

This was not a litigated cased [sic]. This was not a case that the judge issued a compensation order. For whatever reasons, the parties decided to settle this case, and they submitted it to a judge and it was settled. It was an 8(i) settlement. That plain and simple.

If it looks like a duck, and walks like a duck, and it sounds like a duck, it must be a duck. So, it was an 8(i) settlement, and the *quid pro quo* was that the Claimant agreed that he would not shoot the dice at that time and seek a greater compensation award, nor would he attempt to modify it in the future, nor can he modify it now.

And the same thing should hold true for the Employer. It is a strawman to say that the parties couldn't settle this claim because they are not allowed to settle 8(f) cases. I totally agree with that. That isn't what they were doing.

What they did was they agreed to a settlement, that the Claimant was going to get $80.16 from somebody. If the Employer lost his 8(f) petition, Metropolitan would be

on the hook and it would be an 8(i) settlement, and they would have to pay him to this day.

The fact that the Employer was fortunate enough to [p. 8] be able to get 8(f) relief can't be used now as a weapon against the Claimant to withdraw from a settlement that they already made.

The second argument that I have is – the second objection – let me clean that up. Just so the record is clear, Your Honor, I want it on the record that the Claimant formally objects to the introduction of any evidence at this hearing on the guise of a 922 petition by the Employer for the reasons stated.

In addition to that, the Employer has not submitted any medical. I make an offer of proof now that they have no current medical. It is the Claimant's condition that in this circuit, in the Ninth Circuit, since 1933 in the *McCormick* case, the Ninth Circuit has held that the change of condition to justify a 922 modification has to be predicated upon a change on medical condition.

They don't have that. There is a Fourth Circuit decision, *Fleetwood*, which was recently decided, which I have cited, and I have a copy. I would be happy to give it to the court. There is a strong dissenting opinion, by the dissenting judge in the Fourth Circuit,that indicates that there are many reasons why you have to have the medical basis for a 922 petition.

Otherwise, every time the economy hiccups, you are going to either have a line of longshoremen filing 922 [p. 9] motions or the employer is going to be filing 922 motions. It has nothing to do with the change in the economic condition

of the individual based upon his medical at the time of the finding, the time that they agreed or an order was entered establishing his disability, but rather it is due to economic conditions.

Finally, Your Honor, if this Court or any reviewing court deems that the intention of the parties in 1983, when they entered into the stipulation – that the settlement of this claim is an issue, then the Claimant objects to any other Administrative Law Judge proceeding on this case, except Judge Butler, who was there and heard it, and presumably has some record or recollection of what exactly did occur.

JUDGE STEWART: Okay. Mr. Wood.

MR. WOOD: Trying to take these items in turn, I would like to stress that counsel did not, in his pre-trial statement, make a request for a change of judge or I would have provided a case which is right on point, showing that for purposes of modification any judge can hear the proceeding. It does not have to be the judge that issued the original compensation order.

But be that as it may, with regard to the argument that this case has been settled, we have our own trial brief which the Employer would like to submit on its behalf and [p. 10] incorporate herein, which points out, we think quite clearly, with the case of *Laurence*, which is cited therein, that this cannot be a settlement of the case.

It did not conform to the provisions of Section 8(i), (a), or (b), and is therefore not a settlement. Furthermore, it is demonstrated that the process of a settlement – and I use that term in the specific word of art – particular

emphasis must be made as to the manner in which it is submitted and approved.

Lastly, it is impossible to have a settlement that binds to Special Fund, and therefore, since the Judge entertained the Section 8(f) relief, it is pretty obvious the Judge did not consider this to be a settlement.

Counsel's other argument for the Claimant relates to the parties stipulating to the facts. Of course, there are two way [sic] to get evidence before the judge. One is to put on the evidence and otherwise to stipulate. But either way, the judge is not bound by any of the evidence.

And the law requires the judge to make an independent judgment, not only with regard to Section 8(f) relief but with regard to the issue of disability, the extent thereof, and the amount of the compensation that is to be awarded.

So, even though we did enter into certain stipulated facts, the judge still, by law, had to make an [p. 11] independent judgment. And our exhibits include a copy of his decision. Now, in this case it is true, he did incorporate the parties' stipulation on disability. But we all know that he didn't have to do that.

In any event with regard to counsel's objection to the Employer seeking modification pursuant to Section 22, we have covered that with the authority right within the section, which provides that, even though the Special Fund is paying the claimant, the employer, as an interested party, is entitled to seek modification if the facts warrant it.

Next, with regard to no medical, counsel is relying on a case – I think he said 1933. This Act has been amended in 1984, and there are other cases since then which clearly support a change of condition based on economic grounds as a valid basis to pursue modification.

That is what the Employer is doing in this case.

Separate from those items, we simply show that this individual has continued working in the same industry he has worked in before. He has not made a change into some other industry, which might be temporary in nature and potentially leave open for the future some further diminished earnings.

As it is, this gentleman is earning approximately $1700 a week. At the time of the award, he was earning [p. 12] approximately $545 a week. Now, we are well aware – and we wouldn't trouble the Court with this proceeding, by way of our application, if it was simply a matter of telling the Court that, well, $1700 is a lot more than $545, and therefore, it should be modified.

What we have done and what we propose to do here, with our exhibits, is to demonstrate that no matter how you approach this earnings increase, throughout the time span involved, whether you use the national average weekly wage based on inflationary factors or whether you use the actual union increases which come into play by way of union contract agreements every year, that he would have no reasonable basis whatever, through normal attrition of these benefits, to be making the kind of money he is making now.

So, he is still making at least $600 a week more than any of these compounded benefits for the time span in-between. So, in its simplest terms, we say, number one, the Employer does have the right to seek modification. Number two, this is a proper case for modification. Number three, we have earnings capacity demonstrated for this Claimant which supports our position. Thank you.

JUDGE STEWART: Okay. Do you have any evidence you want to present, Mr. Pierry? I am not going to make a decision here today, counsel. I will have to study the issue, and then I will write a written decision. But I am [p. 13] not going to make a decision at the bench here today.

MR. PIERRY: I know this has to end, Your Honor. It can't go on forever. If I may just quickly summarize and respond.

JUDGE STEWART: Okay.

MR. PIERRY: Section 908 states, "Whenever the parties to any claim for compensation under this Act agree to a settlement, Administration Law Judge shall approve the settlement."

I direct your attention to the only document we have in front of us, not what Mr. Wood says that document says, but look at the document itself. The document says, "The parties have stipulated as follows . . . " And they lay out in No. 6 just exactly what they are doing. They lay out in No. 11 that, "These stipulations resolve all issues between the parties, and the parties respectfully request award issue in accordance therewith."

That is what they did. They settled this case. If Administrative Judges want to have these cases bounced back at

them, then I suppose that is where we are going. But as far as the authority in this circuit for a 922 modification as to change of condition, the Ninth Circuit has religiously and without fail, since 1933, followed the *McCormick*, which held that in order to have a 922 modification, the condition precedent is that there was a [p. 14] physical change in the Claimant's condition since the time of the award.

The only decision that he can point to on that level is the Fourth Circuit *Fleetwood* decision, which is a vigorously dissented decision in the Fourth Circuit, with a vigorous dissent by one judge, who I greatly admire, Your Honor.

I think you are bound by the Ninth Circuit. We are sitting in San Pedro, California, and until the Ninth Circuit of the United States Supreme Court changes that decision, then I think you are bound by that decision.

JUDGE STEWART: I would agree we are bound by the law in the Ninth Circuit. Now, as to what the law in the Ninth Circuit is, that is another question. But we are bound by the law in the Ninth Circuit. There is no question about that. We are not bound by the law in the Fourth Circuit.

Do you have any evidence that you want to present at this time?

MR. PIERRY: May I submit the *Fleetwood* decision, Your Honor?

JUDGE STEWART: Okay. Fine. Now, how do you want to – you already have Claimant's Exhibit No. 1, which has been admitted into evidence. Do you want to make this Claimant's Exhibit 2?

[p. 15] MR. PIERRY: Two.

JUDGE STEWART: Do you have any objection?

MR. WOOD: Well, it is just that I think you threw me a little bit when you accepted a trial brief as an exhibit.

JUDGE STEWART: I agree, it is not evidence.

MR. WOOD: All right. That is what I –

JUDGE STEWART: There is no question about it.

MR. PIERRY: The only reason I –

MR. WOOD: Well, I –

(The document referred to was marked for identification as Claimant's Exhibit No. 2 and received into evidence.)

JUDGE STEWART: We have nothing else, I gather, here today?

MR. WOOD: I have exhibits I wish to offer.

JUDGE STEWART: Oh, okay.

MR. WOOD: And if need be, I will call the Claimant.

JUDGE STEWART: I am bending the rules; there is no question, Mr. Wood. Because it is not evidence.

MR. WOOD: Well, I don't care what number it is given, just so it is not evidence, that is all.

MR. PIERRY: Just as long as it is on the record. I don't want it to be like the –

[p. 16] JUDGE STEWART: Right. Right –

MR. PIERRY: – *Pigrenet* decision, where later the BRB ducts [sic] the issue by saying it wasn't raised by the Claimant at the hearing, therefore it was waived.

JUDGE STEWART: I understand your position, Mr. Pierry. You are trying to make exactly clear what your legal position is.

MR. PIERRY: Thank you.

JUDGE STEWART: And you want me to have access to all of the cases that are pertinent to this particular decision. And I appreciate your effort.

MR. PIERRY: Thank you.

JUDGE STEWART: As far as evidence, it is not evidence.

Does that complete your case, Mr. Pierry?

MR. PIERRY: I don't put the case on. He has got the –

JUDGE STEWART: Yes, I know.

MR. PIERRY: Oh. This completes my statement, yes.

JUDGE STEWART: Okay. Fine.

MR. WOOD: Your Honor, we would like to offer Employer's trial brief and the exhibits, if we may.

MR. PIERRY: I have objections to each and every one of them.

[p. 17] JUDGE STEWART: Okay.

MR. WOOD: That is the brief and the exhibits that he is going to argue about, I believe.

JUDGE STEWART: Okay. And you have identified the exhibits as Exhibits A through H.

(The documents referred to were marked for identification as Employer's Exhibits A through H.)

JUDGE STEWART: Mr. Pierry, you have objections to every one of them?

MR. PIERRY: Every single one of them, Your Honor.

JUDGE STEWART: What is your objection to Exhibit A?

MR. PIERRY: Exhibit A, I don't know what it is. It is on Mr. Jim Wood's stationery. I have no idea where these figures came from. He has no affidavit, no jurat by anybody, certifying what these numbers are. I haven't got the faintest idea what they are and I don't believe the Court does either.

JUDGE STEWART: Do you want to respond, Mr. Wood?

MR. WOOD: Yes. These exhibits are numbered in sequence, as the Court said, starting with Exhibit A, and all the pages are numbered.

The Court will note on Page 2 is a breakdown tabulated by the Department of Labor.

[p. 18] MR. PIERRY: I have no objection to that document.

MR. WOOD: That in turn provides the basis for Page 1.

MR. PIERRY: I object to that, Your Honor. If the Court wishes to do some calculation, that is fine. But Mr. Wood should not be able to.

MR. WOOD: Let's let me finish, please.

JUDGE STEWART: One at a time, please. Okay, Mr. Wood.

MR. WOOD: That simply takes the mathematical significance of the numbers and translates it, using the Claimant's average weekly wage at the time of the injury, compounding it up to what it would be October 1, 1989.

So, if counsel doesn't object to Page 2, which is the foundation for Page 1, then I am not sure I appreciate the objection.

MR. PIERRY: Is Mr. Wood taking the stand and testifying as an expert in this? That is what I am objecting to. It is irrelevant and immaterial, and we have no foundation for it.

JUDGE STEWART: Your objection is overruled. It will be admitted into evidence. Employer's Exhibit A will be admitted into evidence. I appreciate your position, Mr. Pierry, but let's face it, Page 1 of Exhibit No. A goes to the weight that I am going to give this particular evidence.

[p. 19] I might not give it any weight at all, but it is admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibit A, was received into evidence.)

JUDGE STEWART: What about B?

MR. PIERRY: B, Your Honor, this again – Mr. Wood asked the Court to take judicial notice of some fellow by the name of Mike Carmelich and what he said in some other case.

And if he wants to have Mr. Carmelich come in and testify and make an offer of proof – he is available; I spoke to him last week. He is in town. I object to this evidence coming in. Again, it is without foundation. I don't know what it proves.

JUDGE STEWART: Mr. Wood, I think you have a serious problem as to Exhibit No. B.

MR. WOOD: Well, Your Honor, on Page 4 I cite the authority which clearly states, on 29 C.F.R. 18.48, that records and other proceedings may be offered in similar proceedings.

Now, we have already been through this modification procedure in the *Henry Corbos* (ph.) case. And –

[p. 20] MR. PIERRY: I –

MR. WOOD: Just a second. And Mr. Carmelich did testify and he did offer – the claimant offered into evidence this very same documentation.

It is nothing more than a guideline of the yearly basic longshore pay increase on hourly rates. And if he has an argument against it, it is not with me. He has been served

before this trial – I didn't just serve it on him today. He was served, whatever it is, 10 or 12 days ago with this document.

And I don't understand why he would have an objection to it.

MR. PIERRY: Your Honor, let me cite to you the case of *Jordon versus Davis Construction Corporation.* It is a BRB decision, on judicial notice. And the Court makes it very clear that even where the administrative tribunal may take judicial notice of extra record facts, because of the vulnerable position in which the opponent is placed by judicial notice, the administrative law judge must be concerned with certain protective measures.

I don't have any chance to cross examine this man. I have no idea where these records came from or the truth or veracity of them. I believe it is an improper exhibit. May I give the case – Claimant's 3.

JUDGE STEWART: Yes.

[p. 21] (The document referred to was marked for identification as Claimant's Exhibit No. 3 and received into evidence.)

MR. PIERRY: 9 Benefits Review Board's –

JUDGE STEWART: I agree Mr. Pierry. I am going to sustain your objection.

MR. WOOD: With regard to that item, Your Honor, we would like to then extract it from our exhibits and append it to our pre-trial brief.

JUDGE STEWART: Okay.

MR. WOOD: Since that is not an exhibit for evidence.

JUDGE STEWART: Right.

MR. WOOD: So, may I jerk it out of there.

JUDGE STEWART: Okay. Fine.

(The document referred to, having been previously marked for identification as Employer's Exhibit B, was withdrawn from evidence.)

MR. WOOD: What was the citation on *Davis – Jordan versus Davis,* BRB?

MR. PIERRY: 9 Benefits Review Board Service – (NOISE) –

MR. WOOD: Volume 9 did you say?

[p. 22] MR. PIERRY: 9.

MR. WOOD: Thank you very much.

JUDGE STEWART: Okay. Now, what is your objection to Exhibit No. C?

MR. PIERRY: None, Your Honor.

JUDGE STEWART: Okay. Exhibit No. C will be admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibit C, was received into evidence.)

JUDGE STEWART: What about D?

MR. PIERRY: Yes, I object to that, Your Honor.

JUDGE STEWART: What is your objection?

MR. PIERRY: I have no objection to the PMA records, which it is cut off on my exhibit, but it is the last seven pages of that exhibit. I only object to the cover sheet where Mr. Wood gives us the benefit of his evaluation of what these records mean.

MR. WOOD: Could you identify that by a page number?

JUDGE STEWART: The problem is I have the same problem here. The bottom is cut off, and I can't tell what – oh, I see, someone has written here, at least part of them, in ink.

[p. 23] MR. WOOD: The only part that is cut off – some of that earnings came to us on fax paper, which is a little longer, so when it was photocopied, just the page number was cut off. That has nothing to do with the records.

JUDGE STEWART: No. What is it – four pages, is that what it is supposed to be?

MR. WOOD: Well, I don't know where we are, Your Honor.

MR. PIERRY: Exhibit D.

MR. WOOD: Exhibit D, as in dog –

JUDGE STEWART: In and of itself, isn't it four pages?

MR. WOOD: That is correct.

MR. PIERRY: The first page is what I object to, not the records from PMA.

JUDGE STEWART: Okay. Do you want to respond, Mr. Wood?

MR. WOOD: Yes, Your Honor. PMA records are tedious to review, and it has been our practice in many cases in my office to retype the actual information from the PMA. This takes no interpretation whatsoever, but it simply lists it in a straight line instead of horizontal and otherwise, as shown on their record.

So, we consider that to be entirely consistent with normal legal procedures. If counsel can point to a [p. 24] flaw, that would be entirely different.

MR. PIERRY: Your Honor, I don't think I have to make his case. He has to come in with admissible evidence. What he is doing now is he is testifying in this to all these exhibits. And I object. I don't have the opportunity to cross examine Mr. Wood.

I shouldn't have to point out any flaws. I think the court is capable of reading records. I think if he wants to put in records, that is fine, but I don't think he should editorialize on them, except as closing argument.

JUDGE STEWART: Your objection is overruled. Exhibit D is admitted into evidence and I will give it the appropriate weight that I think it deserves when I write my decision.

(The document referred to, having been previously marked for identification as Employer's Exhibit D, was received into evidence.)

JUDGE STEWART: What is your objection to Exhibit No. E?

MR. PIERRY: None, Your Honor.

JUDGE STEWART: Okay. Exhibit No. E, then, is admitted into evidence.

[p. 25] (The document referred to, having been previously marked for identification as Employer's Exhibit E, was received into evidence.)

JUDGE STEWART: What about F?

MR. PIERRY: Of course, I object to this whole procedure.

JUDGE STEWART: I understand. I understand your position, Mr. Pierry.

MR. PIERRY: Again, the exhibits attached to it seem to be all the exhibits that we have just done – I don't want him sneaking them in the back door, after the Court has ruled on them.

Again, I would not object to any of the PMA records that are attached, nor to the 208, but I object to Mr. Wood's cover sheet.

JUDGE STEWART: On F?

MR. PIERRY: F. That is the application.

MR. WOOD: My F is all PMA stuff.

MR. PIERRY: My F is Employer's Application for Modification, Section 922.

JUDGE STEWART: He is correct. That is what I have, too.

MR. WOOD: Oh, I beg your pardon. That is included within. That is correct. Well, that is a [p. 26]

pleadings, Your Honor. It is just informative. That is how we got here in the first place.

JUDGE STEWART: Objection overruled.

MR. PIERRY: I have no objection to G and H.

JUDGE STEWART: Okay. Then, Exhibits F, G, and H are admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibits F, G, and H, were received into evidence.)

MR. WOOD: With regard to Exhibit B, Your Honor, if we may jerk that out of the collection and add it to the Employer's pre-trial brief, it would be appreciated. You have the brief.

JUDGE STEWART: Yes. You want to add it in here. Okay. (Pause.) Thank you.

Does that complete your case or are you going to have some testimony?

MR. WOOD: I would like to call the Claimant, Your Honor.

JUDGE STEWART: Okay. Fine. Mr. Rambo.

Let's go off the record a moment.

(Brief discussion off the record.)

JUDGE STEWART: Back on the record.

[p. 27] Whereupon,

JOHN RAMBO

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

JUDGE STEWART: Go ahead, Mr. Wood.

MR. PIERRY: Your Honor, again for the record, the Claimant objects to introduction of any evidence, including this testimony, for reasons already stated on the record.

JUDGE STEWART: Right. Right. Because you don't think the record should be reopened for any reason.

MR. PIERRY: That is right.

JUDGE STEWART: Okay. Go ahead, Mr. Wood.

DIRECT EXAMINATION

Q BY MR. WOOD: Would you please state your full name.

A John D. Rambo.

Q Mr. Rambo, what is your occupation?

A Longshoreman.

Q Were you so occupied in 1980, when you sustained an injury while working for Metropolitan?

A Yes.

Q Your employee number with Pacific Maritime Association, what is that?

A 333130.

Q Would you do that number again for us? 33130?

[p. 28] A 33130.

Q Yes. Thank you. I thought you had an extra 3 in there before. Are you currently employed full time for as a longshoreman?

A Yes.

Q In what capacity?

A Crane operator.

Q About how long have you been a crane operator?

A Four years – five years. Five years.

Q As a crane operator, are you working steady for anyone?

A Yes.

Q Separate from when you are working as a crane operator, do you also sign for what they call volunteer for other jobs?

A No.

Q As a crane operator – according to the Occupational Codings of Pacific Maritime Association, in the year 1988 they showed, for instance, that you put in eight hours as a dockman, for which you were paid.

A I would have to look at my time book.

Q They also show you put in 16 hours as a lift truck operator.

A Okay. I might have. I don't know.

Q They also show you put in time as a heavy lift [p. 29] truck operator. That is a little different pay, isn't it?

A That is just driving a bigger forklifts.

Q Now, if you are working steady for someone as a crane operator, how would it come about that you would sign out with classifications such as a dockman or a lift truck operator, et cetera?

A What do you mean?

Q Let's do it another way. As a steady crane operator for a particular employer, are you expected to be available to them on call?

A Yes.

Q And in exchange for that, are you guaranteed so many hours pay per week?

A Yes.

Q And as such, if they tell you that they are not going to need you on a particular day, are you then eligible to volunteer for work through the dispatch hall?

A If I go to the hall.

Q If you wish to, correct?

A Yes.

Q Now, is that the means by which you can get work as a dockman or a lift truck operator by volunteering?

A Yes.

Q And in order to do that, you would have to go through the old procedure of getting dispatched?

[p. 30] A Yes.

Q And if you do that, you get paid extra for it?

A Yes.

Q And you are still available for the guaranteed hours that your steady employer would otherwise be paying you?

A Yes.

Q Now, we have shown documents here that we have been debating – you heard us debating – from Pacific Maritime Association. Is that where your check comes from?

A Yes.

Q And on your check, the stub that comes with it, will it usually show the identity of each employer you may have worked for, assuming you worked for more than one and that employer's code or number as listed with PMA.

A Yes.

Q So, if you sit home, you can keep your own time book and make sure that you got paid for whatever day you actually work and for whom you work?

A Yes.

Q Now, is that still the way it is as of right now?

A Yes.

Q Is that the way it was before you were injured and at the time of your injury in September of 1980?

A I could volunteer then, yes.

[p. 31] Q At that time, you were not a steady crane operator, then?

A No.

Q Now, currently, they show that most of your hours, the bulk of your hours, are as a gantry crane operator?

A Yes.

Q What is a gantry crane?

A I sit in a chair, like this, with arms, and I have two handles. I just operate it.

Q Is that one of those large items over there on the waterfront that moves containers on and off of vessels?

A Yes.

Q How high off the ground is that?

A Our crane I think is 121 feet.

Q How do you get up there?

A Elevator.

Q Do you only work one crane and that one crane has an elevator?

A APL has five cranes and they all have elevators.

Q So, you are telling me, then, to get on those particular cranes it is not necessary to go up or down the ladder?

A There is a ladder there, 12 feet, 15 feet. I don't know. Then we get on an elevator.

Q So, you can use the elevator for part of the way [p. 32] and a ladder for part of the way?

A Elevator almost all the way, all the way to the top. Just 12 feet – I climb, say, a 12-foot ladder, go into the elevator, and I go up the rest of the way.

Q Okay. So, the elevator doesn't pick up until about 12 feet off the ground?

A Yes. I am guessing on the 12 feet.

Q Approximately.

A Yes.

Q And when you are doing this, this is normally your everyday job?

A Yes.

Q Before you became a steady with one particular employer – which employer is that?

A Before?

Q Excuse me. I will retract that. You are steady with whom?

A Right now?

Q Yes.

A American President Lines.

Q And before you became a steady with them, had you also worked as a crane operator through the hall?

A They picked me up when I made the list on seniority. I went with SSA. They asked me to go steady.

Q So, as soon as they knew that you were available [p. 33] as a crane operator, you were picked up by SSA?

A Yes. Seniority list.

Q And then, in the meantime, you have went over with American President Lines?

A Yes.

Q Now, they have a crane board at the union dispatch hall, as well, do they not?

A Yes.

Q I missed that.

A Yes.

Q And they also have a rule now that steady crane operators are not supposed to work more than 45 hours a week, is that true?

A Under the new contract, 42½.

Q 42½. And the reason for that is to assure that other crane operators out of the hiring hall will get work?

A Yes.

Q We don't know how much they are going to get, but they are going to get more than they would otherwise, isn't that true?

A Yes.

Q Because before some of the crane operators were working more than 45 hours a week.

A The hall was good – (Not audible.)

Q Now, is your job that you presently have of [p. 34] indefinite duration?

A No.

Q What is not definite about it? What is not indefinite about it?

A Matson laid off 50 guys. They can cut back on us and I would have to go back to the hall.

Q You are not working for Matson, right?

A No.

Q But what you are telling me is that one of the lines did lay off some people.

A Yes.

Q Has anyone told you you are being laid off?

A No.

Q Has there been anything specific said that causes you to feel, with any reasonable certainty, that your job is not going to go on indefinitely?

A I don't under –

Q If you don't understand, I would be pleased to rephrase it, if I may.

A I don't know if it is indefinitely or not.

Q But at the moment it is? What I am getting at is –

A I could be there next year. They might close down in two years, five years; I don't know.

Q All right. How long have you been there so far?

[p. 35] A Two-and-a-half years.

JUDGE STEWART: Do you know of anyone that has been laid off for any reason?

THE WITNESS: Well, Matson Company, lack of work – I heard they laid off 50 people.

JUDGE STEWART: What about your company?

THE WITNESS: Well, so far, there are only 15 or 16 of us on nights, and –

JUDGE STEWART: And no one has been laid off?

THE WITNESS: Not right now, no.

JUDGE STEWART: Okay. Go ahead.

Q BY MR. WOOD: Of that number of people, how many are crane operators?

A On nights?

Q That you just mentioned. You gave the Judge a number of 16 people.

A I think 16 on the nights.

Q All crane operators?

A Yes.

Q And as always, let's suppose that you were told that they weren't going to need you today over at American President Lines. Could you also volunteer as a crane operator out of the hall?

A If there is work?

Q That is what I mean.

[p. 36] A Yes. If there is work, which I don't go to the hall. I haven't went – I forgot about the times you told me there, but that was the last time I went.

Q I want you to assume that we have in evidence the PMA earnings records relating to your payroll. What do you estimate your average weekly wage was in 1988, approximately?

A This is '90 –

Q '88.

A That is what is am thinking – this is '90 – 75 to 80. I don't know.

Q Well, let's say the calculations show it is in excess of – around $1600 a week. Does that seem approximately right to you?

A Right now, with our new payroll, I make $1550 a week.

JUDGE STEWART: Now. But what about 1988?

THE WITNESS: I don't know what I made a week then.

Q BY MR. WOOD: In 1989, it showed, according to the payroll, that you averaged approximately $1700 a week. Does that seem correct?

A I don't know.

MR. PIERRY: Your Honor, I object. He doesn't have those records in front of him, and I think he is asking [p. 37] him to speculate. The records speak for themselves.

JUDGE STEWART: Objection overruled. Go ahead.

Q BY MR. WOOD: If you don't know the answer, just tell us you don't know the answer. I am just asking you does $1700 seem about correct per week?

A I can't tell you that.

Q Do you recall what you earned for the whole year in 1989?

A No, I don't.

Q But you are satisfied that every check you get comes through Pacific Maritime Association?

A Yes.

JUDGE STEWART: Do I understand correctly, Mr. Rambo, that if you were laid off at American President and you had to try to get work some place else, would your chances of getting a new job depend upon seniority?

THE WITNESS: Only in crane – it took me 20 years to become a crane operator. Then I made the list. Now, if I go back to the hall, it is whatever company wants to pick up a crane operator. There is no seniority.

JUDGE STEWART: They can pick up anyone they want?

THE WITNESS: They can pick up anyone they want.

JUDGE STEWART: Okay. Go ahead.

Q BY MR. WOOD: But nevertheless, you could still work through the hall, not only as a crane operator but in

[p. 38] any other capacity that you feel you want to work through the hall?

A I –

Q You could work like you have. You could work as a dockman if you wanted to.

A Yes.

Q Or as a heavy truck operator or –

A Yes. Something that I don't have to bend over and pick up.

Q The crane operator's work is preferred, I take it, because it pays more?

A Yes.

Q And if you are a steady, you get guaranteed hours?

A Yes.

MR. WOOD: I have nothing further, Your Honor.

CROSS EXAMINATION

Q BY MR. PIERRY: Crane operator's work is preferred, not only because it pays more but because it is an easier job, isn't it?

A Yes.

Q Physically less demanding?

A Oh, yes.

Q Has your physical condition since 1983 gotten better, or worse, or stayed the same?

A I would say at least the same, because I still [p. 39] can't do certain things.

Q And how many days a week on average do you work?

A Three, maybe four.

Q On the average, if you have 52 weeks in front of you, how many would you say you work three days per week?

A What do you mean –

Q The last 52 weeks –

MR. WOOD: I object. The question has been asked and answered, three to four days a week.

JUDGE STEWART: Objection overruled. Go ahead.

Q BY MR. PIERRY: How many weeks out of the last 52 did you work three? If you can give us a percentage, a majority, a minority, 50 percent –

A I would say the majority three, maybe four, if I am answering right.

Q When you went to crane school in 1986, there were four instructors, were there not?

A Yes, there were a few of them, yes.

Q They came and went, but there were four positions where PMA and the union had four different guys

instructing the various people that went through that class on how to operate these hammerhead cranes, correct?

A Yes.

Q They are down to one, isn't that correct?

A I don't know. Since I graduated, I couldn't tell [p. 40] you.

MR. PIERRY: I would make an offer of proof, Your Honor, that they are down to one.

MR. WOOD: Well, I object, Your Honor. We were talking about attorneys testifying.

JUDGE STEWART: Objection sustained.

Q BY MR. PIERRY: Do you know, from whatever knowledge, any source, as to what the plans of the union and the PMA to bring in more crane drivers are? Are they going to bring in more, less, the same or –

A Right now –

MR. WOOD: I object, without foundation.

Q BY MR. PIERRY: Your own knowledge, whatever you can tell us.

JUDGE STEWART: Objection is overruled.

THE WITNESS: Right now there is not enough work at the crane hall – at the hall – because that is why they are lowering our hours.

Q BY MR. PIERRY: If you lose your job at Eagle Marine, you go back to the – you work out of the hall, correct?

A Yes.

Q As low man out at the hall, isn't that right?

A Yes. You go on an hourly system.

Q Could you explain to the Court what low man out [p. 41] means?

A If we work tonight, we get eight hours – nine hours on the print. And if I go out – say I am 10 guys out and I don't get out tonight, tomorrow night I will be on, say, zero hours. This guy is on nine. Then I take a job.

Then I come back. I check in on nine, but he is on the board before me and he would get the job first.

Q Let me take you back to 1983. Your case was set for hearing before the United States Department of Labor, on Wilshire Boulevard. Do you remember that?

A Yes.

Q And you drove down with your attorney at the time, whose name was –

A Goldwater.

Q Goldwater. And after you checked in, you went down to the cafeteria, and you sat at one table and Mr. Goldwater and Mr. Wood sat at another table. Is that right?

A Yes.

Q Tell the Court what happened after that?

A They called me over there after Goldwater and Wood were talking, and Goldwater said that we were

going to get $80 – say, $80 and some change a week. And I looked at him and Wood said – Goldwater said, "This is your settlement." And then, Wood said, "You will get this as a settlement."

And I said – because the sum was little, the [p. 42] amount I was getting, I said, "Well, this isn't very much." I talked to Goldwater, and they said, "You [sic] settlement will be this for life."

Q Who said that?

MR. WOOD: Your Honor, I am going to object at this moment, to hearsay statements made by his attorney, which the attorney is alive and he is available. He could have been called as a witness. We are being quoted – I don't know what Mr. Goldwater told him, and it is irrelevant what he told him.

JUDGE STEWART: Objection sustained.

MR. PIERRY: For the record, Your Honor, may I be heard. This is percipient testimony. He is testifying to what he heard Mr. Goldwater say in front of Mr. Wood, and Mr. Wood was there. This isn't hearsay.

THE WITNESS: He told me for life.

MR. PIERRY: This is percipient testimony.

JUDGE STEWART: Mr. Wood.

MR. WOOD: It is being offered for the truth of the matter. That is what makes it hearsay. Mr. Goldwater could have told him anything. If he wants to disagree with Mr. Goldwater –

JUDGE STEWART: He said Mr. Wood.

MR. WOOD: Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I [p. 43] guess.

JUDGE STEWART: Well, he said he heard you say it. He has a right to testify as to what he heard you say.

Go ahead.

MR. PIERRY: That is all I have, Your Honor.

JUDGE STEWART: Any redirect?

REDIRECT EXAMINATION

Q BY MR. WOOD: Were you aware at all times that I was the attorney for Metropolitan, while your case was in litigation?

A Only when we went to court, as far as I remember.

Q Did you ever discuss with Mr. Goldwater the difference between a settlement and a compensation aware [sic]?

A He discussed – I don't remember everything, but I do remember sitting there in the cafeteria with both of you.

Q The word "settlement" might be – did anybody use the word –

A He said for life.

Q – resolution of the claim or submission of the facts or anything like that?

A I don't recall that. All I know is you said for life and Goldwater wrote it down on a piece of paper, and you two were taking about it.

Q He never told you about the provisions in the Act that provided for modification, in fact that you could [p. 44] modify it and get more money if you later got worse? He never discussed that with you?

A I don't know if he did or not. All I know is that it was said that I had it for life.

JUDGE STEWART: By Mr. Wood?

(Brief pause off the record.)

JUDGE STEWART: The answer was by Mr. Wood and by Mr. Goldwater.

MR. WOOD: Well, let's go back and hear it. I want to hear it myself, if I may, because the machine stopped running.

Q BY MR. WOOD: Who told you that you would have this payment for life?

A Both of you.

Q Who is both of us?

A You and Goldwater.

Q I told you that you would have this payment for life?

A We were sitting there in the cafeteria. You were on the left. You called me over later, and you were talking about what I am going to get a week. You said, "You will get this for life." Goldwater was saying – I looked at him and he said, "Well, this is the rest of your life."

And he wrote it down in the figures. "This is what you get two weeks, and you will get this for the rest [p. 45] of your life."

Q And who said that?

A Goldwater said that, and you said, "For your life."

Q I said, "For your life"? I told you that?

A You were saying – between – now you are getting me confused – between both of you that I was supposed to get this for life.

Q So, don't worry about what I said. Your attorney never told you that this case could be modified either at your request or the Employer's request?

A I don't know if he told me that or not, because I just was listening. I don't remember that.

Q Well, don't you think that would be germane to the discussion as to whether you are going to get something for life or not, if it could be modified?

A I understood I had it for life.

Q You have received your payments continuously up until today, haven't you?

A Yes.

Q And that was following the Judge's order?

A Yes.

Q So, I take it from what you say that your impression was that Mr. Goldwater was settling your case, is that what you are telling us?

[p. 46] A Yes, with you, yes.

Q With me?

A Well, I mean, we were there together. You were there with –

MR. WOOD: Your Honor, it may be that we have a mistake of fact here, and what really should happen is the award should be vacated going back to the date of its inception, if that is the case. In which event, we would request reimbursement and go to trial on the issues.

JUDGE STEWART: That is not going to happen, Mr. Wood. Go ahead.

MR. WOOD: I have nothing further.

MR. PIERRY: Nothing further, Your Honor.

JUDGE STEWART: Fine. Does that complete your case, Mr. Wood?

MR. WOOD: It does.

JUDGE STEWART: Okay. You may step down.

(Whereupon, the Witness was excused.)

JUDGE STEWART: And you had indicated you have nothing at all, Mr. Pierry, except your legal argument.

MR. PIERRY: Yes, Your Honor.

JUDGE STEWART: Okay. Fine.

Since we have the trial brief – Mr. Wood do you want to write a brief after the hearing here today, in addition, or not?

[p. 47] MR. WOOD: Well, I could for the purpose of citing the case that he brought up, the issue of whether Judge Butler had to hear this case or not.

JUDGE STEWART: Yes. Do you or don't you? That is all I want to know.

MR. WOOD: No. That is clear. I don't think it is necessary.

JUDGE STEWART: Okay. Mr. Pierry?

MR. PIERRY: No, Your Honor.

JUDGE STEWART: Okay. Fine. This hearing will be concluded at 3:13 p.m. Thank you, counsel.

(Whereupon, at 3:13 p.m., the hearing in the above-entitled matter was adjourned.)

U.S. Department of Labor Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California
94105

(seal)

In the Matter of	
JOHN RAMBO, Claimant	Case No. 83-LHC-242
against	OWCP No. 18-6945
METROPOLITAN STEVEDORE COMPANY, Self-Administered Employer	

DECISION AND ORDER GRANTING MODIFICATION

This proceeding involves a request for modification of the November 28, 1983, Decision and Order Awarding Benefits of Administrative Law Judge Butler. The request for modification was filed on October 30, 1989, pursuant to the provisions of 30 U.S.C. § 922.

ISSUES

1. Whether the employer's request for modification of the 1983 Decision and Order under the provisions of 30 U.S.C. § 922 should be granted.

2. Whether the administrative law judge who approved the settlement is the one required to rule on the issue of modification.

Background

The parties stipulated that the Claimant, John Rambo, became permanently, partially disabled as the result of an injury to his back and leg sustained on September 9, 1980; that the Claimant's condition became permanent and stationary on November 16, 1981; and that the Claimant sustained an overall current permanent partial disability equivalent to 22½% of the whole person amounting to a compensation rate of $80.16 per week for permanent partial disability. This stipulated "settlement" was incorporated into a Decision and Order of the administrative law judge. The only issue which the administrative law judge decided in his Decision and Order was whether § 908(f) was applicable.

Then, on October 30, 1989, Employer filed an application for modification under Section 922 alleging that the Claimant's current earning capacity had increased substantially.

JURISDICTION

A. Administrative Law Judge

Claimant alleges that the motion for modification must be heard by the same administrative law judge assigned to the original claim. This allegation is without merit. In *Finch v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 196 (1989), the Benefits Review Board held that there is no requirement under the Act that a motion for modification must be heard by the same administrative law judge assigned to the original claim.

B. Section 922 Modification

Claimant contends that the stipulations contained in the November 28, 1983, Decision and Order of the administrative law judge constitute a settlement between the parties. However, Judge Butler's Decision and Order awarding benefits does not constitute the approval of a settlement because it fails to provide in specific terminology for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in the Claimant's best interest as is required under Section 8(i) of the Act. *Finch v. Newport News Shipbuilding and Dry Dock Company, supra.* Therefore, Judge Butler's Decision and Order must be considered as an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22.

DISCUSSION

In the original Decision and Order dated November 28, 1983, it was stipulated that the Claimant's average weekly wages were $534.38 per week at the time of the pertinent injury, that Claimant sustained an overall current permanent partial disability equivalent to 22.5% of the whole person which produced a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

Section 22 of the Act, 33 U.S.C. §922, authorizes the modification of a Decision and Order based on a change in condition or mistake of fact at any time prior to one year after the last payment of compensation. Modification based on a change in condition may be granted in cases in

which the claimant's economic condition has changed following the entry of an award of compensation. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS 282 (1984).

Employer in the instant case contends that since Claimant is presently earning more money than at the time of his injury, Claimant did not have a loss of wage-earning capacity. However, higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). One has to consider wage-earning capacity in an open labor market under normal employment conditions.

Claimant testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working fulltime as a longshoreman (Tr. 27-8).[1] He is presently working steadily as a crane operator for American President Lines (Tr. 28, 32). He has been working as a crane operator for four or five years (Tr. 28). In addition to working as a crane operator, Claimant volunteers for work as a lift truck operator and a heavy lift truck operator for which he receives additional pay (Tr. 28-30). When Claimant works as a crane operator, he works most of the time as a gantry crane operator (Tr. 31). The crane which he operates is 131 feet high (Tr. 31). In order to reach the place where he works, Claimant has to climb a 12 to 15 foot ladder and then take an elevator (Tr.

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[1] In this decision, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's Exhibits and "Tr." refers to the transcript of the hearing.

31). As a crane operator, he is not allowed under the contract to work more than 42.5 hours per week (Tr. 33).

According to the Claimant, he is now making $1,550.00 per week (Tr. 36). He prefers doing crane work because it pays more money and it is easier work than some of the other jobs (Tr. 38).

Claimant testified that his physical condition since 1983, when he was awarded permanent partial disability, has remained about the same (Tr. 38-9).

According to the Claimant, Matson Lines has laid off 50 men; however, there has been no indication by the company for which he works that anyone is going to be laid off (Tr. 34).

The evidence in the instant case shows that Claimant earned a total of $70,662.67 for 1985 for an average weekly wage of $1,358.90; a total of $68,006.22 for 1986 for an average weekly wage of $1,307.81; a total of $67,953.72 for 1987 for an average weekly wage of $1,306.80; a total of $76,332.19 for 1988, for an average weekly wage of $1,467.93; a total of $87,873.53 for the work beginning December 31, 1988, and ending December 23, 1989, for an average weekly wage of $1,689.88; and a total of $67,619.96 for the week beginning December 30, 1989, and ending September 22, 1990, for an average weekly wage of $1,690.50.

Claimant's average weekly wages have increased from $534.38 per week in 1980 when Claimant was injured to $1,690.50 as of September 22, 1990. This demonstrates that the Claimant's average weekly wages more

than tripled from 1980 to 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

Accordingly, I find that the Claimant no longer has a wage-earning capacity loss and that his disability payments should be discontinued effective on the date of this Decision and Order.

ATTORNEY'S FEES

Inasmuch as the Claimant did not prevail in this proceeding, the attorney is not entitled to any fee.

ORDER

It is hereby ORDERED that Claimant's disability be terminated effective as of the date of this Decision and Order.

/s/ Daniel Lee Stewart
DANIEL LEE STEWART
Administrative Law Judge

Dated: MAY 29, 1991
San Francisco, California

DLS:bll

U.S. Department of Labor
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

(seal)

BRB No. 91-1538

JOHN RAMBO Claimant-Petitioner	)	**NOT PUBLISHED**
v.	)	
METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER
Respondent	)	(Filed Nov. 9, 1992)

Appeal of the Decision and Order Granting Modification of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry (Magana, Cathcart, McCarthy & Pierry), Wilmington, California, for claimant.

James J. Wood, Long Beach, California, for self-insured employer.

LuAnn Kressley (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (83-LHC-242) of Administrative Law Judge Daniel Lee Stewart on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 9, 1980, claimant injured his back and leg while working for employer. In a Decision and Order dated November 28, 1983, Administrative Law Judge James J. Butler awarded claimant temporary total disability compensation from September 10, 1980 through November 22, 1981, and permanent partial disability compensation thereafter. Pursuant to the stipulations of the parties, the administrative law judge found that claimant's average weekly wage at the time of injury was $534.38, that claimant had sustained a 22 1/2 percent impairment of the whole person which the parties equated to a $120.24 per week loss in wage-earning capacity, and that accordingly claimant was entitled to permanent partial disability compensation based on an $80.16 per week compensation rate. In addition, the administrative

law judge awarded claimant's counsel an attorney's fee payable by employer, *see* 33 U.S.C. §928, and awarded employer relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Thereafter on October 30, 1989, employer sought modification of the permanent partial disability award pursuant to Section 22, 33 U.S.C. §922, arguing that there had been a change in claimant's wage-earning capacity such that he is no longer disabled. In a Decision and Order dated May 29, 1991, Administrative Law Judge Daniel Lee Stewart granted modification, noting that claimant had completed training and was currently working as a crane operator, a higher paying yet less strenuous job, which he had been performing for four or five years and was not in danger of losing. In addition, Judge Stewart noted that claimant also was able to obtain additional pay by volunteering to work as a lift truck operator and heavy lift truck operator. Finally, Judge Stewart found that claimant's average weekly wage had more than tripled between the time of his injury in 1980 and the hearing in 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, he concluded that claimant no longer had a loss in his wage-earning capacity. The administrative law judge therefore ordered that the award of permanent partial disability compensation be terminated as of the date of the decision and order. Claimant appeals, arguing that the granting of modification was improper. Employer and the Director, Office of Worker's Compensation Programs, respond, urging affirmance.

Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the

date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. §922. With the enactment of the 1984 Amendments to the Act, Section 22 was amended to prohibit the modification of settlements which were entered into pursuant to Section 8(i), 33 U.S.C. §908(i)(1988). The Board had previously reached the same conclusion under the pre-1984 Act. *See Lambert v. Atlantic & Gulf Stevedores,* 17 BRBS 68 (1985).

Initially, we reject claimant's assertion that Judge Butler's original Decision and Order constitutes the approval of a Section 8(i) settlement which could not be modified pursuant to Section 22. This decision fails to provide for the complete discharge of employer's liability and lacks any findings as to whether the compensation awarded was in claimant's best interest as was required under Section 8(i) at the time of Judge Butler's decision. 33 U.S.C. §908(i) (1982) (amended 1984). Accordingly, Judge Butler's Decision and Order was, as Judge Stewart properly determined, simply an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22. *Norton v. National Steel & Shipbuilding Co.,* 25 BRBS 79, 84 (1991); *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

Claimant's contention that the administrative law judge erred in granting modification absent a showing of a change in his physical condition is similarly without merit. Contrary to claimant's assertions Judge Stewart correctly recognized that modification pursuant to Section 22 may be granted based solely upon a change in claimant's economic condition. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.,* 776 F.2d 1225, 18

BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1991); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989). Claimant has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on claimant's increase in wage-earning capacity after the original award of benefits. We therefore affirm his determination that claimant was no longer disabled as of the date of his decision.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nance S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

Cite as 94 C.D.O.S. 4781

JOHN RAMBO, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents,

No. 92-70783

United States Court of Appeals for the Ninth Circuit

OWCP No. 18-6945 BRB No. 91-1538

Petition for Review of an Order of the Benefits Review Board Argued and Submitted March 14, 1994 – San Francisco, California

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

COUNSEL

Thomas J. Pierry, Magana, Cathcart, McCarthy & Pierry, Wilmington, California, for the petitioner.

LuAnn Kressley, United States Department of Labor, Office of the Solicitor, Washington, D.C., for the respondents.

Filed June 24, 1994

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for the benefits because he was presently working at a job that paid him $1,505.21 per week – almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. § 922.[2] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's *physical* condition can justify an award modification. A change in a claimant's wages, training,

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[2] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

Analysis

Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages – without proof of a change in his physical condition – was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. § 922. *See* id. at 86 (rejecting the petition for modification because it was not based upon "*a change in physical condition*," but rather upon the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. § 922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. See id. at 1235 (Warriner, J., dissenting) (noting that "[b]eginning

with the first opinion dealing with the question, [*McCormick,*] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. § 922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent, *United States v. Lewis*, 991 F.2d 524, 525 n.1 (9th Cir.), *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*, and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO, Claimant-Petitioner, v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents.	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 ORDER (Filed Aug. 10, 1994)

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

(4)

No. 94-820

SUPREME COURT, U.S.
FILED
FEB 22 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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QUESTION PRESENTED

Whether the "change in conditions" that permits modification of a disability award under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, includes a change in an injured employee's wage-earning capacity that results from factors other than a change in the employee's physical condition.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	3
Summary of argument	7
Argument:	
The "change in conditions" that will permit modification of an award under Section 22 of the LHWCA includes a change in an injured employee's wage-earning capacity that results from factors other than a change in the employee's physical condition	9
A. The language and purposes of the LHWCA require that the "conditions" permitting modification include non-physical conditions that are relevant to a claimant's continuing entitlement to compensation	9
B. The Director's construction is consistent with earlier interpretations of Section 22 and is entitled to deference	20
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Alaska Packers Ass'n v. *Pillsbury*, 301 U.S. 174 (1937)	22
Allen v. *Metropolitan Stevedore*, 8 Ben. Rev. Bd. Serv. (MB) 366 (1978)	23-24
American Mut. Ins. Co. v. *Jones*, 426 F.2d 1263 (D.C. Cir. 1970)	13
Atlantic Coast Shipping Co. v. *Golubiewski*, 9 F. Supp. 315 (D. Md. 1934)	23, 24

Cases—Continued: Page

Avondale Shipyards, Inc. v. *Guidry*, 967 F.2d 1039 (5th Cir. 1992) 15, 23
Banks v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) 10, 26
Bath Iron Works Corp. v. *Director, OWCP*, 113 S. Ct. 692 (1993) 13
Bay Ridge Operating Co. v. *Lowe*, 14 F. Supp. 280 (S.D.N.Y. 1936) 24
Bethlehem Shipbuilding Corp. v. *Cardillo*, 23 F. Supp. 400 (D. Mass. 1938), aff'd, 102 F.2d 299 (1st Cir.), cert. denied, 307 U.S. 645 (1939) 24
Boudreaux v. *American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) 25
Bowen v. *Yuckert*, 482 U.S. 137 (1987) 14
Brown v. *Gardner*, 115 S. Ct. 552 (1994) 28
Burley Welding Works, Inc. v. *Lawson*, 141 F.2d 964 (5th Cir. 1944) 22
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 25, 26, 28
Dingess v. *Director, OWCP*, 12 Black Lung Rep. (MB) 1-141 (1989) 12
Director, OWCP v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283 (6th Cir. 1988) 25
Director, OWCP v. *Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987) 23
Director, OWCP v. *Edward Minte Co.*, 803 F.2d 731 (D.C. Cir. 1986) 23
Director, OWCP v. *General Dynamics Corp.*, 980 F.2d 74 (1st Cir. 1992) 25
Director, OWCP v. *General Dynamics Corp.*, 982 F.2d 790 (2d Cir. 1992) 25
Director, OWCP v. *O'Keefe*, 545 F.2d 337 (3d Cir. 1976) 25
Eastern S.S. Lines, Inc. v. *Monahan*, 110 F.2d 840 (1st Cir. 1940) 13, 14
Edwards v. *Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 114 S. Ct. 1539 (1994) .. 15
Estate of Cowart v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992) 9, 26

Cases—Continued: Page

Fleetwood v. *Newport News Shipbuilding & Dry Dock Co.*:
16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985) 5, 27
776 F.2d 1225 (4th Cir. 1985) 15, 16, 20, 21, 22, 29
Force v. *Director, OWCP*, 938 F.2d 981 (9th Cir. 1991) 25
Franklin County Mining Co. v. *Industrial Comm'n*, 153 N.E. 608 (Ill. 1926) 24
Gardner v. *Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981) 14
General Dynamics Corp. v. *Director, OWCP*, 673 F.2d 23 (1st Cir. 1982) 22
Heckler v. *Campbell*, 461 U.S. 458 (1983) 14
Hole v. *Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981) 15, 23
Independence Indem. Co. v. *White*, 27 S.W.2d 529 (Tex. Comm'n App. 1930) 24
Indianapolis Pump & Tire Co. v. *Surface*, 155 N.E. 835 (Ind. App. 1927) 24
Intercounty Constr. Corp. v. *Walter*, 422 U.S. 1 (1975) 10, 26
John W. McGrath Corp. v. *Hughes*, 289 F.2d 403 (2d Cir. 1961) 13
Jordan v. *Decorative Co.*, 130 N.E. 634 (N.Y. 1921) 21
LaFaille v. *Benefits Review Bd.*, 884 F.2d 54 (2d Cir. 1989) 15, 29
Louisiana Ins. Guar. Ass'n v. *Abbott*, 40 F.3d 122 (5th Cir. 1994) 13, 14
Lucero v. *Climax Molybdenum Co.*, 732 P.2d 642 (Colo. 1987) 23
Martin v. *OSHRC*, 499 U.S. 144 (1991) 26
McCord v. *Cephas*, 532 F.2d 1377 (D.C. Cir. 1976) 7
McCormick S.S. Co. v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933) 6, 20, 21, 26

Cases—Continued: Page

McDougall v. *E.P. Paup Co.*, 21 Ben. Rev. Bd. Serv. (MB) 204 (1988), aff'd, 999 F.2d 1341 (9th Cir. 1993) 12
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987) 26
New Orleans (Gulfwide) Stevedores v. *Turner*, 661 F.2d 1031 (5th Cir. 1981) 13
Newport News Shipbuilding & Dry Dock Co. v. *Howard*, 904 F.2d 206 (4th Cir. 1990) 25
O'Keeffe v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) 10
Owens v. *Traynor*, 274 F. Supp. 770 (D. Md. 1967), aff'd, 396 F.2d 783 (4th Cir.), cert. denied, 393 U.S. 962 (1968) 14
Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) 26
Peabody Coal Co. v. *Gossett*, 819 S.W.2d 33 (Ky. 1991) 28
Pillsbury v. *Alaska Packers Ass'n*, 85 F.2d 758 (9th Cir. 1936), rev'd, 301 U.S. 174 (1937) 6, 21, 22, 26
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980) 26
Randall v. *Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984) 15, 29
Ray's Case, 119 A. 191 (Me. 1922) 21
Sea-Land Serv., Inc. v. *Rock*, 953 F.2d 56 (3d Cir. 1992) 25
See v. *Washington Metro. Area Transit Auth.*, 36 F.3d 375 (4th Cir. 1994) 13
Skelly Oil Co. v. *Thomas*, 295 P. 213 (Okla. 1931) .. 24
South v. *Indemnity Ins. Co. of N. Am.*, 146 S.E. 45 (Ga. Ct. App. 1928) 24
Swift & Co. v. *Neal*, 18 N.E.2d 491 (Ind. App. 1939) 24
Vasquez v. *Continental Maritime*, 23 Ben. Rev. Bd. Serv. (MB) 428 (1990) 15
Verderane v. *Jacksonville Shipyards, Inc.*, 772 F.2d 775 (11th Cir. 1985) 23

Cases—Continued: Page

Welch v. *Leavey*, 397 F.2d 189 (5th Cir. 1968), cert. denied, 393 U.S. 1049 (1969) 14
Whitney v. *Agsco Dakota*, 453 N.W.2d 847 (S.D. 1990) 23

Statutes, regulations and rule:

Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 11, 23
30 U.S.C. 932(a) 11
30 U.S.C. 932(g) 12
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 3
§ 2(10), 33 U.S.C. 902(10) 2, 3, 13, 21, 28
§ 2(14), 33 U.S.C. 902(14) 11
§ 3(e), 33 U.S.C. 903(e) 12
§ 8(c)(1)-(20), 33 U.S.C. 908(c)(1)-(20) 13
§ 8(c)(21), 33 U.S.C. 908(c)(21) 4, 13
§ 8(c)(22), 33 U.S.C. 908(c)(22) 13
§ 8(c)(23), 33 U.S.C. 908(c)(23) 13
§ 8(f), 33 U.S.C. 908(f) 4, 19
§ 8(g), 33 U.S.C. 908(g) 18
§ 8(h), 33 U.S.C. 908(h) 29
§ 8(j), 33 U.S.C. 908(j) 16
§ 9(b), 33 U.S.C. 909(b) 11
§ 9(b)-(d), 33 U.S.C. 909(b)-(d) 11
§ 9(d), 33 U.S.C. 909(d) 11
§ 19(c), 33 U.S.C. 919(c) 3
§ 19(d), 33 U.S.C. 919(d) 3
§ 19(e), 33 U.S.C. 919(e) 3
§ 21(a)-(c), 33 U.S.C. 921(a)-(c) 3
§ 22, 33 U.S.C. 922 ..... *passim*
§ 39(a), 33 U.S.C. 939(a) 3, 25, 26
§ 39(c), 33 U.S.C. 939(c) 18
§ 44(c)(2)(B), 33 U.S.C. 944(c)(2)(B) 4
§ 44(i)(2), 33 U.S.C. 944(i)(2) 4

Statutes, regulations and rule—Continued: Page

Longshore and Harbor Worker's Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639:
§ 8(h), 98 Stat. 1646-1647 17
§ 16, 98 Stat. 1650 27
Social Security Act, 42 U.S.C. 301 *et seq.*:
42 U.S.C. 402(x) 24
42 U.S.C. 423(d)(1)(A) 14
42 U.S.C. 423(d)(2)(A) (1988 & Supp. V 1993) 14
42 U.S.C. 423(f)(2)-(4) 28
42 U.S.C. 1382c(a)(4)(B)-(D) 28
Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 28
§ 2(a), 98 Stat. 1794-1796 28
§ 2(c), 98 Stat. 1796-1797 28
Ariz. Rev. Stat. Ann. § 23-1044.F (Supp. 1994) 12
Ga. Code Ann. § 34-9-104(a) (Michie 1992) 12
Ky. Rev. Stat. Ann. § 342.125 (Michie/Bobbs-Merrill Supp. 1994) 12
Va. Code Ann. (Michie 1991 & Supp. 1994):
§ 65.2-101 12
§ 65.2-708 12
20 C.F.R.:
Section 701.202(a) 3, 25
Section 702.105 3
Section 702.148(b) 4
Section 702.148(c) 17
Section 702.315(a) 3
Section 702.316 3
Sections 702.331 *et seq.* 3
Section 702.373 3
Section 702.373(a) 6
Section 702.373(d) 18
Section 725.310(a) 11
Fed. R. Civ. P. 60(b) 11

Miscellaneous: Page

Annotation, *Workmen's Compensation: Statutory Phrase "Incapacity for Work" or the Like, As Including Inability To Obtain Work Following an Injury*, 33 A.L.R. 115 (1924) 21
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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-820

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-5a) is reported at 28 F.3d 86. The decisions and orders of the Benefits Review Board (Pet. App. 6a-10a) and administrative law judges (Pet. App. 11a-17a; 94-1045 Pet. App. 16a-20a [1]) are unreported.

[1] The Solicitor General filed a petition for a writ of certiorari on behalf of the Director, Office of Workers' Compensation Programs, seeking review of the same court of appeals' decision at issue here. *Director, Office of Workers' Compensation Programs* v. *John Rambo and Metropolitan Stevedore Co.*, No. 94-1045 (filed Dec. 12, 1994). The Court has not acted on that petition.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1994. The petition for rehearing filed by Metropolitan Stevedore Company was denied on August 10, 1994. Pet. App. 1a. The petition for rehearing filed by the Director, Office of Workers' Compensation Programs, was denied on September 14, 1994. 94-1045 Pet. App. 21a-22a. Metropolitan's petition for a writ of certiorari was filed on November 7, 1994, and was granted on January 13, 1995. 115 S. Ct. 787. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(10) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(10), provides in relevant part that " '[d]isability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Section 22 of the LHWCA, 33 U.S.C. 922, provides in relevant part:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, * * * review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue

a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation.

STATEMENT

1. In 1980, respondent John Rambo injured his back and leg while working as a longshore "frontman" for petitioner Metropolitan Stevedore Company. See Pet. App. 3a, 7a, 12a. He filed a disability claim with the Department of Labor under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*[2] The LHWCA defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).

In 1983, an administrative law judge (ALJ) accepted a stipulation between Rambo and Metropolitan that Rambo had sustained a 22½% permanent partial disability that had produced a weekly wage loss of $120.24 per week, or 22½% of his average weekly wages of $534.88. 94-1045 Pet. App. 17a-18a. Under

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[2] Administration of the LHWCA is entrusted to the Secretary of Labor, see 33 U.S.C. 939(a), and that task has been assigned by regulation to the Office of Workers' Compensation Programs (OWCP), see 20 C.F.R. 701.202(a). The OWCP investigates claims, and in uncontested cases a district director (formerly a deputy commissioner, see 20 C.F.R. 702.105) in OWCP may issue awards. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). In contested cases, parties may obtain hearings before an administrative law judge (ALJ), who then issues a decision awarding or denying benefits. 33 U.S.C. 919(d); 20 C.F.R. 702.316, 702.331 *et seq.* An ALJ decision is reviewable by the Department's Benefits Review Board, and Board decisions are reviewable in the courts of appeals. 33 U.S.C. 921(a)-(c). Modification of compensation awards is governed by 33 U.S.C. 922 and 20 C.F.R. 702.373.

Section 8(c)(21) of the LHWCA, Rambo therefore received an award of $80.16 per week, which represented 66⅔% of "the difference between the average weekly wages of [Rambo] and [Rambo's] wage-earning capacity thereafter in the same employment or otherwise." 33 U.S.C. 908(c)(21). See 94-1045 Pet. App. 17a-18a. Pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f), the ALJ also limited Metropolitan's liability for permanent disability compensation to 104 weeks, after which a Special Fund, which the Director of the Office of Workers' Compensation Programs (OWCP) administers, became liable for the $80.16 weekly payments. 94-1045 Pet. App. 19a-20a; see 33 U.S.C. 944(i)(2).[3]

2. After receiving the disability award, Rambo attended crane school and obtained longshore work as a crane operator. Pet. App. 3a, 14a. He worked in that position for four to five years and performed additional work as a heavy lift truck operator when time was available. *Id.* at 14a. Between 1985 and

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[3] Although the Special Fund assumed liability for Rambo's compensation after the first 104 weeks under the award, Metropolitan retains a financial interest in the outcome of this case. Under the LHWCA, an employer's required contribution to the Special Fund depends in part on the amount of payments made by the Fund "during the preceding calendar year which are attributable to the" employer. 33 U.S.C. 944(c)(2)(B). In recognition of their continuing financial interest, employers "are given the authority to monitor their claims in the special fund," 20 C.F.R. 702.148(b), and are among the "part[ies] in interest" who are permitted to seek modification of an award. 33 U.S.C. 922; see 20 C.F.R. 702.148(b) (employer "can initiate [a] proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits").

1990, his average weekly earnings ranged from $1,307.81 to $1,690.50, or more than three times his pre-injury earnings. *Id.* at 15a-16a; see also *id.* at 3a. His physical condition, however, remained essentially unchanged. See *id.* at 3a, 15a. In 1989, Metropolitan sought modification of the award pursuant to Section 22 of the LHWCA, 33 U.S.C. 922, arguing that Rambo's increased earnings represented a "change in conditions" such that he is no longer "disab[led]" under the Act. Pet. App. 8a, 14a.

In 1991, a second ALJ agreed with Metropolitan and terminated Rambo's disability payments. Pet. App. 11a-17a. Relying on *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985), the ALJ reasoned that modification may be based on a change in a claimant's economic condition following an award. Pet. App. 13a-14a. The ALJ recognized that higher post-injury earnings are not necessarily determinative of an employee's wage-earning capacity and that it therefore was necessary "to consider wage-earning capacity in an open labor market under normal employment conditions." *Id.* at 14a. After undertaking that inquiry, the ALJ found that Rambo in fact no longer had a loss of wage-earning capacity. *Id.* at 14a-16a. In particular, the ALJ noted that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that Rambo was at no greater risk of losing his present job or seeking employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Ibid.*[4]

[4] The ALJ also rejected Rambo's arguments that only the ALJ who issued the 1983 award could modify it and that the

The Benefits Review Board affirmed. Pet. App. 6a-10a. Relying on *Fleetwood*, the Board rejected Rambo's argument that modification could not be granted absent a showing of a change in the claimant's physical condition. Pet. App. 9a. The Board also noted that Rambo "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [Rambo's] increase in wage-earning capacity after the original award of benefits." *Id.* at 10a.

3. The court of appeals reversed. Pet. App. 2a-5a. The court construed its own precedents, "supported by the clear weight of authority" (*id.* at 5a), to "make clear that only a change in a claimant's *physical* condition can justify an award modification." *Id.* at 3a; see *id.* at 4a (citing *Pillsbury* v. *Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), rev'd on other grounds, 301 U.S. 174 (1937); and *McCormick S.S. Co.* v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933)). Thus, in the court's view, "[a] change in a claimant's wages, training, skills, or educational background is insufficient." Pet. App. 3a-4a.[5]

1983 award, which was based on stipulated facts, could not be modified because it was a "settlement." Pet. App. 12a-13a; see 33 U.S.C. 922 (settlements not subject to modification); 20 C.F.R. 702.373(a) (same). The Benefits Review Board agreed that the 1983 award was not a settlement, Pet. App. 9a, and did not discuss Rambo's arguments concerning the particular ALJ's authority to modify the award. The court of appeals did not reach either of those questions, and they are not at issue here.

[5] The court of appeals did not address Rambo's contention (see Br. in Opp. i) that Metropolitan's application for modifi-

SUMMARY OF ARGUMENT

A. Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA) allows modification of a disability award on account of a "change in conditions." 33 U.S.C. 922. Section 22's plain language demonstrates that the grounds for modification are not limited to a change in only one condition, such as a claimant's state of health, but also include other conditions relevant to a claimant's continuing entitlement to compensation. That construction is consistent with this Court's decisions, which have interpreted Section 22 broadly and have refused to read unstated limitations into the words that Congress chose.

The structure and purposes of the LHWCA also demonstrate that Section 22 allows modification based on changes in non-physical conditions bearing on entitlement to the award. The LHWCA provides death benefit awards to a deceased employee's survivors, based on various considerations. Those awards, however, are routinely subject to modification based on changes in the relevant conditions of entitlement,

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cation should be denied because its attorney represented to Rambo, who was represented by his own counsel, that the award would be paid for life. Whether such representations amounted to an express waiver of Metropolitan's right to seek modification, and whether modification of the award (now paid by the Special Fund, which was not a party to any such representations) should be denied on the ground that it would not "render justice under the [A]ct," see *McCord* v. *Cephas*, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976), are fact-bound questions that this Court should not address in the first instance. If this Court reverses the judgment in this case, the court of appeals may consider those issues on remand.

such as the remarriage of a surviving spouse, an end to dependency, or the receipt of concurrent benefits under another statute. The same approach should be followed in the case of a disability award that is based on a reduction in the employee's wage-earning capacity. That approach, which allows modification of awards to reflect changes in the employee's wage-earning capabilities, ensures that disability compensation will be fairly distributed based on a current measure of actual entitlement.

The construction that we urge is also consistent with the LHWCA's reporting provisions, which allow employers to require disabled employees to report their earnings. The only apparent purpose of that reporting requirement is to apprise employers of a possible basis for seeking modification of an award based on a change in the claimant's wage-earning capacity. More generally, the construction that we urge advances the LHWCA's goal of rehabilitating disabled workers by creating a positive financial incentive for employers to participate in rehabilitation programs. A contrary construction would not only impede the smooth operation of the statutory scheme, but could also be costly to the Special Fund, which the Director administers.

B. Contrary to the court of appeals' view, the phrase "change in conditions" has not been uniformly construed to mean only a change in a worker's physical condition. Even if it had been so construed, however, the Director's interpretation should prevail. Her interpretation not only finds compelling support in the statutory language, structure and purposes, but it is also a reasonable accommodation of the LHWCA's policies that is entitled to judicial deference. The

Director's construction is consistent with other interpretive aids as well, such as the LHWCA's legislative history, and it promotes sound administration of the Act. Under the Director's interpretation, changes in general economic conditions are not by themselves changes in conditions for LHWCA eligibility, and a mere change in a claimant's wages does not automatically establish a change in a claimant's wage-earning capacity.

ARGUMENT

THE "CHANGE IN CONDITIONS" THAT WILL PERMIT MODIFICATION OF AN AWARD UNDER SECTION 22 OF THE LHWCA INCLUDES A CHANGE IN AN INJURED EMPLOYEE'S WAGE-EARNING CAPACITY THAT RESULTS FROM FACTORS OTHER THAN A CHANGE IN THE EMPLOYEE'S PHYSICAL CONDITION

A. The Language And Purposes Of The LHWCA Require That The "Conditions" Permitting Modification Include Non-Physical Conditions That Are Relevant To A Claimant's Continuing Entitlement To Compensation

1. Section 22 of the LHWCA expressly allows modification of compensation because of a "change in conditions." 33 U.S.C. 922. Under the "normal" or "natural reading" of the Act, *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2595 (1992), the phrase "change in conditions" includes all conditions relevant to a claimant's continuing entitlement to compensation. Congress presumably used the unadorned plural term "conditions" intentionally. The plural usage indicates that modification is not limited to a change in only one condition, such as a claimant's physical state of health, but also includes

the full range of relevant circumstances. See, *e.g.*, *The American Heritage Dictionary of the English Language* 393 (3d ed. 1992) ("condition" may mean, *inter alia*, a "state of health," while "conditions" means "[e]xisting circumstances").

2. This Court's decisions construing Section 22's language show that "change in conditions" should not be confined to a change in physical condition. This Court has construed Section 22 broadly and has accordingly refused to give the statutory language a "narrowly technical and impractical construction" or to read unstated limitations into it. *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (per curiam). For example, the Court has refused to construe that Section to create a limitations period for acting on a timely filed claim. *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1 (1975). The Court has likewise refused to limit the "mistake in a determination of fact" ground for modification to mistakes that are demonstrated by new evidence rather than by the agency adjudicator's "further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256. It has also refused to limit that ground for modification to "clerical errors and matters concerning an employee's disability, not to matters concerning an employer's liability." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 462 (1968).

The Court should similarly refuse to read unstated limitations into the "change in conditions" ground for modification. Indeed, it would be anomalous to construe Section 22 simultaneously to allow the reopening of a final award for any reason to correct perceived factual mistakes in matters that have already been litigated, but to deny corrective authority

when the litigated facts have changed and the conditions that once justified payment of ongoing monetary benefits can no longer sustain that award. Cf. Fed. R. Civ. P. 60(b) (allowing a court to provide relief from a judgment on a variety of grounds, including mistake and changed circumstances).

3. More generally, the structure and purposes of the LHWCA's benefits scheme demonstrate that the changed conditions that may provide a basis for modification are not limited to changes in a claimant's physical condition. For example, it is well settled that, in death benefit cases, eligibility depends on whether a deceased employee's survivor qualifies as a dependent spouse, child, or other dependent relative. See 33 U.S.C. 909(b)-(d). Eligibility ends when a spouse dies or remarries, a child's age or status as a student or disabled dependent changes, or another relative is no longer dependent. 33 U.S.C. 902(14), 909(b) and (d). Section 22 unquestionably requires modification of a survivor's benefits award whenever there is a change in the survivor's eligibility status—a change that (with the exception of disabled dependent status) has no connection to the surviving claimant's physical condition. See 43 Fed. Reg. 36,786 (1978) (comments to regulations under Black Lung Benefits Act).[6]

Similarly, payment of disability and death benefits depends in part on whether a claimant is receiving

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[6] The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, incorporates a number of LHWCA provisions, including Section 22's provision for modification based on a change in conditions or a mistake in a determination of fact. See 30 U.S.C. 932(a) (incorporation provision); 20 C.F.R. 725.310(a) (modification provision).

concurrent benefits under another applicable law "for the same injury, disability, or death." 33 U.S.C. 903(e); see also 30 U.S.C. 932(g) (Black Lung Benefits Act). Accordingly, if a state decision establishing or modifying a claimant's entitlement to benefits under state law is rendered following an award of LHWCA benefits, it may be considered a change in conditions that supports modification of the LHWCA compensation order. *McDougall* v. *E.P. Paup Co.*, 21 Ben. Rev. Bd. Serv. (MB) 204, 208 (1988), aff'd on other grounds, 999 F.2d 1341 (9th Cir. 1993); see also *Dingess* v. *Director, OWCP*, 12 Black Lung Rep. (MB) 1-141 (1989); 43 Fed. Reg. 36,786 (1978) (Black Lung Benefits Act).[7]

The same principles should apply in "non-schedule" disability cases, such as this one, in which a loss of wage-earning capacity is an essential condition for entitlement to compensation and the employee's wage-earning capacity is determined on the basis of factors in addition to the employee's physical condition.[8]

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[7] As a general matter, state workers' compensation statutes, like the LHWCA, base entitlement on wage-earning capacity, not just physical condition. See 1C A. Larson, *The Law of Workmen's Compensation* § 57.11 (1994). Although state laws vary, at least some of them allow modification based on non-physical factors, including a change in earning capacity. See 3 A. Larson, *supra*, § 81.31(e); Ariz. Rev. Stat. Ann. § 23-1044.F (Supp. 1994) (modification based on non-physical factors, including a change in earning capacity); Ga. Code Ann. § 34-9-104(a) (Michie 1992) (same); Ky. Rev. Stat. Ann. § 342.125 (Michie/Bobbs-Merrill Supp. 1994) (same); Va. Code Ann. §§ 65.2-101, 65.2-708 (Michie 1991 & Supp. 1994) (same).

[8] A "schedule" case is one in which compensation is determined by reference to a schedule or list describing parts or

Because the LHWCA defines "[d]isability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10), courts have long recognized that "[t]he degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, his mentality, his education, and the availability of that type of work which he can do." *Eastern S.S. Lines, Inc.* v. *Monahan*, 110 F.2d 840, 842 (1st Cir. 1940); accord, *e.g.*, *Louisiana Ins. Guar. Ass'n* v. *Abbott*, 40 F.3d 122, 126 (5th Cir. 1994) (White, J.); *See* v. *Washington Metro. Area Transit Auth.*, 36 F.3d 375, 381 (4th Cir. 1994); *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1037-1038 (5th Cir. 1981); *American Mut. Ins. Co.* v. *Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970); *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403, 405 (2d Cir. 1961).

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functions of the body and prescribing a fixed number of weeks of compensation for their loss (or loss of use). See 33 U.S.C. 908(c)(1)-(20), (22); *Bath Iron Works Corp.* v. *Director, OWCP*, 113 S. Ct. 692, 695 (1993); 1C A. Larson, *supra*, § 57.14(c). An employee with a scheduled injury is conclusively presumed to be disabled, even if the injury does not actually affect his wage-earning capacity. *Bath Iron Works*, 113 S. Ct. at 695 n.4. In a "non-schedule" case, which involves an injury that is not specified in the "schedule" or in a provision governing certain retiree claims, an employee receives compensation for two-thirds of the difference between his pre-injury average weekly wages and his post-injury wage-earning capacity. See 33 U.S.C. 908(c)(21) ("non-schedule" provision); 33 U.S.C. 908(c)(23) (retiree provision); *Bath Iron Works*, 113 S. Ct. at 695-696.

Thus, an LHWCA claimant who retains some physical ability to work may nevertheless be found to be totally disabled if there is no work available that the claimant can perform, *e.g.*, *Louisiana Ins.*, 40 F.3d at 126-127; *Eastern*, 110 F.2d at 841-842, while one who has a physical impairment from an injury may not be disabled at all if available employment results in no loss of wage-earning capacity. *Owens* v. *Traynor*, 274 F. Supp. 770, 773-776 (D. Md. 1967), aff'd, 396 F.2d 783 (4th Cir.), cert. denied, 393 U.S. 962 (1968); see also *Gardner* v. *Director, OWCP*, 640 F.2d 1385, 1390 (1st Cir. 1981); *Welch* v. *Leavey*, 397 F.2d 189, 191 (5th Cir. 1968), cert. denied, 393 U.S. 1049 (1969). Compare *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142, 146-147 (1987) (discussing parallel concepts under Social Security disability programs); *Heckler* v. *Campbell*, 461 U.S. 458, 459-462 (1983) (same); see 42 U.S.C. 423(d)(1)(A) and (d)(2)(A) (1988 & Supp. V 1993) (definition of "disability" under Social Security Act providing for consideration of claimant's "age, education, and work experience" and the existence of suitable work in the national economy).

The principles expressed in prior LHWCA cases, which manifestly apply in initial non-schedule benefit determinations, should also apply upon a request to modify the initial award. For example, if a disabled employee's initial award is based on a finding that he has retained some wage-earning capabilities, but his retained skills become obsolete on account of particular technological advances, the change in his wage-earning capacity may justify a modification of his disability award. Conversely, if the disabled employee has enhanced his wage-earning capacity

through the acquisition of new skills—the situation presented in this case—the change may also justify a modification. As the Fourth Circuit explained, all changes in an employee's "wage-earning capabilities should be relevant when considering a modification of an award." *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1229 (1985); accord *Avondale Shipyards, Inc.* v. *Guidry*, 967 F.2d 1039, 1042 n.6 (5th Cir. 1992); 3 A. Larson, *The Law of Workmen's Compensation* § 81.31(e) (1994). See also *Hole* v. *Miami Shipyards Corp.*, 640 F.2d 769, 772-773 (5th Cir. 1981); *Vasquez* v. *Continental Maritime*, 23 Ben. Rev. Bd. Serv. (MB) 428 (1990); cf. *Edwards* v. *Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993) (claimant disabled despite temporary work), cert. denied, 114 S. Ct. 1539 (1994).[9]

The Fourth Circuit's result ensures that employees with similarly impaired wage-earning capacities are treated alike: Compensation is awarded for a non-schedule physical impairment—at an initial hearing

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[9] In some circumstances, a request for modification may be time-barred, notwithstanding a change in wage-earning capacity. For example, a claimant whose compensation is terminated because of an increase in wage-earning capacity may be prevented from reinstating the payment of compensation if the claimant suffers a subsequent loss in wage-earning capacity more than one year after the termination. See 33 U.S.C. 922 (allowing modification within one year of the last payment of compensation "or at any time prior to one year after the rejection of a claim"). That one-year limitation also applies, however, to the initial adjudication of claims, *Fleetwood*, 776 F.2d at 1232, and may be extended by "de minimis" awards in certain cases. See *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 62 (2d Cir. 1989); *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 800 (D.C. Cir. 1984); *Hole*, 640 F.2d at 772.

or on modification—only insofar as that impairment causes a continuing loss of wage-earning capacity. "Without such a modification procedure, workers who had secured new skills and employment would be receiving disability compensation when they were not disabled and an [i]nequitable distribution of limited financial resources would result." *Fleetwood*, 776 F.2d at 1229. See also *id.* at 1232; *Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act (Part 2): Hearings Before the Subcomm. on Compensation, Health and Safety of the House Comm. on Educ. and Labor*, 95th Cong., 2d Sess. 494 (1978) (statement of Donald Elisburg, Assistant Secretary for Employment Standards, U.S. Dep't of Labor, that if a claimant arbitrarily refuses rehabilitation services after a final award, the employer could seek modification on the ground of a change in condition).

By contrast, the Ninth Circuit's conclusion that "only a change in a claimant's *physical* condition can justify an award modification" (Pet. App. 3a) ignores the established framework for determining non-schedule benefit payments under the LHWCA, which calculates awards based on the claimant's actual wage-earning capabilities. Under the Ninth Circuit's rule, an employer would be obligated to pay for benefits even when they are unnecessary to compensate injured workers for any continuing loss of wage-earning capacity.

4. Section 8(j) of the LHWCA, 33 U.S.C. 908(j), also indicates that a non-physical change in wage-earning capacity is a "change in conditions" that permits modification. That Section allows employers to require disabled employees "to report to the employer not less than semiannually any earnings from

employment or self-employment," and it provides for forfeiture of compensation by employees who fail to report. That provision, which was part of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 8(h), 98 Stat. 1646-1647, was enacted "in response to the problem of a disabled employee receiving workers' compensation benefits while he has actually returned to gainful employment." 129 Cong. Rec. 571 (1983) (statement of Sen. Nickles); see also H.R. Rep. No. 570, 98th Cong., 1st Sess. 17-18 (1983) (reports "intended to be a device by which employers may maintain some control over claims in payment status"). It is unlikely that Congress would have imposed that reporting requirement on all employees who earn income if no possibility of modification existed in the absence of a change in an employee's physical condition. See 130 Cong. Rec. 8327 (1984) (statement of Rep. Erlenborn) ("It is anticipated that employers will utilize the procedures for modification of awards set forth in section 22 for any subsequent adjustment to benefits.").[10]

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[10] Similarly, the Director's regulations provide that "[a]n employer or insurance carrier may conduct any reasonable investigation regarding cases placed into the special fund by the employer or insurance carrier. Such investigation may include, but shall not be limited to, a semi-annual request for earnings information[,] * * * periodic medical examinations, vocational rehabilitation evaluations, and requests for any additional information needed to effectively monitor such a case." 20 C.F.R. 702.148(c). The regulatory provision governing modification of awards establishes procedures to be followed "[i]f the investigation, described in [20 C.F.R.] 702.148(c), discloses a change in conditions and the employer or insurance carrier intends to pursue modification of the

5. The interpretation of Section 22 that we urge also advances the LHWCA's goal of rehabilitating disabled workers, see 33 U.S.C. 908(g) and 939(c), by creating a positive incentive for employers to participate in rehabilitation programs that provide disabled employees with new vocational skills. The LHWCA's rehabilitation programs are an important part of the overall statutory scheme. Under the interpretation of the Act adopted by the Director and applied by the Benefits Review Board, employers have a strong incentive to promote vocational training for disabled workers and thereby reduce their disability benefits expenditures.[11]

The court of appeals' decision in this case, by contrast, would reduce the employers' financial motivation to participate in rehabilitation efforts. Under the court of appeals' rule, an employee who does not receive rehabilitation until after the award issues

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award of compensation." 20 C.F.R. 702.373(d). The scope of the permissible investigation, and the express recognition that the investigation may reveal a "change in conditions" warranting modification of an award, plainly reflect the premise that the grounds for modification extend beyond changes in the employee's physical condition. The Director's interpretation is entitled to judicial deference. See pp. 25-30, *infra*.

[11] In fiscal year 1993, LHWCA programs successfully rehabilitated 364 employees and provided assistance to 1,178 continuing participants. Employment Standards Admin., U.S. Dep't of Labor, *OWCP Annual Report to Congress FY 1993*, at 13, 24 (1994). A previous annual report noted that about 45% of rehabilitated employees were placed with their previous employers. Employment Standards Admin., U.S. Dep't of Labor, *Longshore and Harbor Workers' Compensation Act: Annual Report on Administration of the Act During Fiscal Year 1992*, at 8-9 (1993).

would be entitled to retain the full award without regard to the effect of future rehabilitation on his wage-earning capacity. Thus, the court of appeals' rule would give employers a diminished incentive to assist in rehabilitating injured workers, because rehabilitation, unless completed prior to the award of compensation, would not reduce the employers' liability.

The court of appeals' ruling could also impair the smooth operation of the statutory scheme by creating incentives for inappropriate delays. On the one hand, an employer would have an incentive to delay the award proceedings until the injured employee's rehabilitation is complete and could be taken into account in determining the award. On the other hand, the injured employee would have an incentive to delay rehabilitation until after receipt of a compensation award, when rehabilitation can no longer be considered in adjusting the award. Those perverse incentives—whether they result in postponement of the compensation award or postponement of rehabilitation—are inimical to the statutory objectives.

6. The court of appeals' rule could also be costly for the Special Fund, which the Director administers. See *OWCP Annual Report to Congress FY 1993*, at 43 (Fund paid more than $90.86 million in 4,672 "second injury" or Section 8(f) cases and approximately $4.8 million in rehabilitation services in fiscal year 1993). Neither the Fund, nor an employer, should be required to pay for compensation based on a disability that has diminished or ceased to exist, as reflected in a permanent increase in wage-earning capacity, even if the claimant's physical condition has not improved.

B. The Director's Construction Is Consistent With Earlier Interpretations Of Section 22 And Is Entitled To Deference

1. In rejecting the Director's construction of Section 22, the Ninth Circuit stated that the phrase "change in conditions" has been uniformly construed "to refer exclusively to a *change in* [*the*] *physical condition* of the employee receiving compensation." Pet. App. 5a (emphasis added by the Ninth Circuit, quoting *Fleetwood*, 776 F.2d at 1235 (Warriner, J., dissenting)). That statement is inaccurate. As the Fourth Circuit recognized, no reported court case (excluding the subsequent decision in this case) "holds that modification of a compensation award cannot be granted when an employee experiences a permanent increase in wage-earning capacity." *Fleetwood*, 776 F.2d at 1229.

None of the cases cited by the Ninth Circuit as establishing that principle so hold, although some include dicta to that effect. For example, the Ninth Circuit relied on its prior ruling in *McCormick S.S. Co.* v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (1933), which was the first officially reported decision to construe Section 22. In that case, an employee sought to obtain increased compensation through modification because "depressed economic conditions" had resulted in decreased stevedoring work. *Id.* at 85. The Ninth Circuit stated that "we do not think [Section 22] applies to a change in earnings due to economic conditions." *Ibid.* That statement falls far short of a holding that a "change in conditions" excludes all increases in a claimant's wage-earning capacity unless they are accompanied by a change in physical condition.

As the Fourth Circuit recognized, the *McCormick* decision actually supports the Director's position. *McCormick* recognized that "[c]ompensation is awarded only for loss of earning power," 64 F.2d at 85, and it denied modification because the claimant's decrease in wages resulted from lack of work, not from a decrease in his wage-earning capacity, *id.* at 86. See *Fleetwood*, 776 F.2d at 1231. That holding is consistent with the Director's view that an inability to earn wages because of general economic conditions is not an inability "because of injury." See 33 U.S.C. 902(10) (defining "[d]isability"). At bottom, *McCormick* simply held that general economic conditions are not among the "conditions" that are taken into account in determining eligibility for an award.[12]

The Ninth Circuit was also mistaken in relying on its previous decision in *Pillsbury* v. *Alaska Packers Ass'n*, 85 F.2d 758 (1936), rev'd on other grounds, 301 U.S. 174 (1937). The court of appeals observed in that case that whether a claimant was an employee at the time of injury was "obviously" not susceptible to a "change in conditions." 85 F.2d at 759-760. The Director has no quarrel with that conclusion. See also *Fleetwood*, 776 F.2d at 1232 n.6. The

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[12] State courts have long recognized a distinction between a compensable inability to obtain work that results from limited job opportunities available to persons who are physically disabled and a noncompensable inability that results from general economic conditions. See, *e.g.*, *Jordan* v. *Decorative Co.*, 130 N.E. 634, 635 (N.Y. 1921) (Cardozo, J.); *Ray's Case*, 119 A. 191, 192 (Me. 1922); Annotation, *Workmen's Compensation: Statutory Phrase "Incapacity for Work" or the Like, As Including Inability To Obtain Work Following an Injury*, 33 A.L.R. 115 (1924).

Pillsbury decision went on to state, however, that " 'change in conditions' refers to a change in the physical condition of the employee." *Id.* at 760. That observation was mere dictum that did not purport to decide whether an increase in wage-earning capacity could be a change in conditions.[13]

The Ninth Circuit's reliance on *Burley Welding Works, Inc.* v. *Lawson*, 141 F.2d 964 (5th Cir. 1944), was also misplaced. That decision held that a wage increase is not a change in conditions if it does not fairly and reasonably reflect the employee's wage-earning capacity. *Id.* at 966. *Burley*'s holding is correct and is consistent with the Director's view. See *ibid.* (quoting deputy commissioner's decision); *Fleetwood*, 776 F.2d at 1231. *Burley*'s summary of prior law, however, was not accurate. It stated that "the term 'change in conditions' * * * means a change in the employee's physical condition, *and not other conditions*." 141 F.2d at 966 (emphasis added). The only cases that *Burley* cited for that proposition were *McCormick* and *Pillsbury*, which—as we have explained—contain no such holding. See *Fleetwood*, 776 F.2d at 1231-1232. The Ninth Circuit's reliance on *General Dynamics Corp.* v. *Director, OWCP*, 673 F.2d 23 (1st Cir. 1982), suffers from the same flaw. *General Dynamics* repeated the *Burley* dicta, 673 F.2d at 25 & n.6, but did not consider whether a

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[13] Moreover, *Pillsbury* has no precedential value, because this Court reversed the Ninth Circuit's decision on the ground that "the circuit court of appeals was without jurisdiction to entertain the attempted appeal." *Alaska Packers Ass'n* v. *Pillsbury*, 301 U.S. 174, 177 (1937).

"change in conditions" could include a change in wage-earning capacity.[14]

Other cases, not cited in the Ninth Circuit's opinion, contain similar statements.[15] Those cases, like the cases the Ninth Circuit cited, simply reflect a repetition of dicta rather than careful analysis. Their actual holdings are by and large consistent with the position the Director advocates here. For example, in *Atlantic Coast Shipping Co.* v. *Golubiewski*, 9 F. Supp. 315 (D. Md. 1934), a district court held that imprisonment is not a "change in conditions" under Section 22, but stated in dictum that the phrase "would seem obviously to refer to a change in the physical condition of the employ[ee] caused by the accident." *Id.* at 317. The court reasonably concluded that an inability to work caused by imprisonment is not a condition that bears on the statutory definition of "disability" under the LHWCA. *Id.* at 317-318; see also *Allen* v. *Metropolitan Stevedore*, 8 Ben. Rev.

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[14] It is questionable whether the Fifth Circuit itself would construe *Burley* to require a change in physical condition. That court has recently expressed approval of *Fleetwood*. See *Avondale Shipyards*, 967 F.2d at 1042 n.6; cf. *Hole*, 640 F.2d at 772-773.

[15] See, *e.g.*, *Director, OWCP* v. *Drummond Coal Co.*, 831 F.2d 240, 244 n.9 (11th Cir. 1987) (Black Lung Benefits Act); *Director, OWCP* v. *Edward Minte Co.*, 803 F.2d 731, 735 (D.C. Cir. 1986); *Verderane* v. *Jacksonville Shipyards, Inc.*, 772 F.2d 775, 780 (11th Cir. 1985); *Whitney* v. *Agsco Dakota*, 453 N.W.2d 847, 851-852 (S.D. 1990) (construing pre-*Fleetwood* LHWCA decisions as "holding" that "change in conditions" means a change in physical condition); *Lucero* v. *Climax Molybdenum Co.*, 732 P.2d 642, 647 (Colo. 1987) (same).

Bd. Serv. (MB) 366, 368 (1978).[16] The court's dictum regarding the employee's physical condition, however, was entirely unnecessary to its decision.[17]

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[16] As the district court in *Golubiewski* pointed out, the LHWCA contains no statutory exclusion from eligibility for benefits on the part of a person who is imprisoned. Compare 42 U.S.C. 402(x) (limiting the payment of Social Security disability insurance benefits to persons imprisoned on the basis of a felony conviction).

[17] Other cases contain similar dictum. See *Bay Ridge Operating Co.* v. *Lowe*, 14 F. Supp. 280, 281 (S.D.N.Y. 1936) (commitment to a mental institution); *Bethlehem Shipbuilding Corp.* v. *Cardillo*, 23 F. Supp. 400, 403 (D. Mass. 1938) (imprisonment), aff'd, 102 F.2d 299 (1st Cir.), cert. denied, 307 U.S. 645 (1939). The district courts in *Bay Ridge*, 14 F. Supp. at 281, and *Golubiewski*, 9 F. Supp. at 317, relied in part on state workers' compensation cases in concluding that "change in conditions" refers to a change in an injured employee's physical condition. See also *Bethlehem Shipbuilding*, 23 F. Supp. at 403 (relying on *McCormick*, *Bay Ridge*, and *Golubiewski*). The state cases they cite, however, construed statutes materially different from Section 22 of the LHWCA and are therefore not persuasive authority. See *Independence Indem. Co.* v. *White*, 27 S.W.2d 529, 531 (Tex. Comm'n App. 1930) (state laws allowing review and modification of awards are designed to allow an increase, decrease, or termination of awards because of a change in physical condition); *Skelly Oil Co.* v. *Thomas*, 295 P. 213, 214 (Okla. 1931) (construing the term "change of condition"); *South* v. *Indemnity Ins. Co. of N. Am.*, 146 S.E. 45, 46 (Ga. Ct. App. 1928) (same); *Indianapolis Pump & Tire Co.* v. *Surface*, 155 N.E. 835 (Ind. App. 1927) (same); *Franklin County Mining Co.* v. *Industrial Comm'n*, 153 N.E. 608, 610 (Ill. 1926) (state law allowing modification if "disability of the employee has subsequently recurred, increased, diminished or ended"). Cf. *Swift & Co.* v. *Neal*, 18 N.E.2d 491, 493 (Ind. App. 1939) (a 1934 state statute allowing modification "on account of a change in conditions" does not "necessarily mean that there

2. Even if the Ninth Circuit were correct that courts had "uniformly" construed Section 22 to require a change in an employee's physical condition, the Director has permissibly reached a different interpretation. The Director acts on behalf of the Secretary of Labor, who is charged with administering the LHWCA, see 33 U.S.C. 939(a); 20 C.F.R. 701.202(a), and the Director's construction of the phrase "change in conditions" is therefore entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). See, *e.g.*, *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 793-795 (2d Cir. 1992); *Force* v. *Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co.* v. *Howard*, 904 F.2d 206, 208-209 (4th Cir. 1990); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983).[18]

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must be a change in the physical condition of the injured employee").

[18] Not all courts of appeals have deferred to the Director's construction of the LHWCA. See, *e.g.*, *Sea-Land Serv., Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992); *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 287-288 (6th Cir. 1988); cf. *Director, OWCP* v. *General Dynamics Corp.*, 980 F.2d 74, 78 (1st Cir. 1992) (reserving question). Courts refusing to defer have relied on the erroneous premise that "neither the Director nor the [Benefits Review] Board is the officer or agency charged with the administration of the [LHWCA]." *Director, OWCP* v. *O'Keefe*, 545 F.2d 337, 343 (3d Cir. 1976). They overlook that the Director acts pursuant to a delegation of authority from the Secretary, 20 C.F.R. 701.202(a), who has express authority to "administer" the

As we have explained, the Director's interpretation is the most natural construction of the language of Section 22 and is consistent with the structure and purposes of the Act. The Director's interpretation should therefore prevail. See *Chevron*, 467 U.S. at 842-843. There is nothing in other interpretive sources, such as the legislative history, to support a contrary construction. Instead, the legislative history of the LHWCA and its amendments during the 1930s confirms that Congress drafted Section 22 to give agency adjudicators broad authority to reconsider and modify awards. See *Intercounty Constr.*, 422 U.S. at 8-12 (discussing legislative history); *Banks*, 390 U.S. at 463-465 (same).[19]

LHWCA and "make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a). Compare *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696-697 (1991); *Martin* v. *OSHRC*, 499 U.S. 144 (1991); *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987). As an adjudicatory tribunal without administrative authority, the Benefits Review Board receives no special deference. See *Estate of Cowart*, 112 S. Ct. at 2595; *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).

[19] Congress amended Section 22 in 1934 and 1938. See *Intercounty Constr.*, 422 U.S. at 8-12. During that same general time period, the Ninth Circuit decided *McCormick*, *supra*, and *Pillsbury*, *supra*, which contained dicta suggesting that a "change in conditions" was limited to the employee's physical condition. See pp. 20-22, *supra*. There is no reason to believe that Congress intended to ratify those dicta. The amendments Congress enacted did not address the issue, and there is scant evidence that Congress was aware of the statements in those decisions. The United States Employees' Compensation Commission (USECC), which administered the LHWCA until 1946, mentioned those and numerous other cases in its annual reports to Congress. *Twenty-First Annual*

The legislative history of Congress's 1984 amendments to the LHWCA similarly provides no basis for rejecting the Director's construction. To the contrary, the legislative history indicates that Congress expected Section 22 to be used to adjust the compensation of disabled employees who had returned to gainful employment. See 130 Cong. Rec. 8327 (1984) (statement of Rep. Erlenborn). In that regard, Congress amended Section 22 to give employers (such as petitioner in this case) authority to seek modification of awards that are paid primarily by the Special Fund that the Director administers. See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 16, 98 Stat. 1650; H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 32 (1984).

Furthermore, although the legislative history accompanying the 1984 amendments shows that Congress intended to overrule some Board decisions, see H.R. Conf. Rep. No. 1027, *supra*, at 30; 130 Cong. Rec. 25,902-25,903 (1984) (statement of Rep. Miller); *id.* at 26,300 (statement of Sen. Hatch), it contains no expression of dissatisfaction with the Board's decision in *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985), which approved an award modification based on changes in non-physical conditions. In light of that history, there is no plausible basis to believe that Congress ratified pre-*Fleetwood* dicta suggesting that

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Report of the USECC 56 (1937) (describing *Pillsbury*); *Seventeenth Annual Report of the USECC* 15 (1933) (describing *McCormick*). But the USECC's brief summaries provide no basis to think that Congress approved of the dicta in those decisions.

a "change in conditions" is limited to a change in the employee's physical condition. See generally *Brown* v. *Gardner*, 115 S. Ct. 552, 556-557 (1994).[20]

3. The Director's construction is also sound insofar as it reflects a reasonable accommodation of the policies "committed to the agency's care." *Chevron*, 467 U.S. at 845. The Director's construction will not overburden the agency and courts with modification requests because, as discussed above, a change in wage-earning capacity necessary to support modification must be a change in an employee's capacity to earn wages because of injury. See 33 U.S.C. 902(10) (" '[d]isability' means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury" (emphasis added)). Thus, changes in general economic conditions, as in *McCormick*, are not by themselves changes in the conditions causing (or eliminating) disability and therefore should not be a basis for modification.[21]

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[20] In the same year in which it enacted the LHWCA amendments discussed in the text, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, which expressly provides for termination of disability benefits in circumstances other than those in which the individual's medical condition has improved. See § 2(a) and (c), 98 Stat. 1794-1797, codified at 42 U.S.C. 423(f)(2)-(4) and 1382c(a)(4)(B)-(D). It therefore is unlikely that Congress would have intended to foreclose that result under the LHWCA when it amended that Act in 1984.

[21] The fact that state laws authorize modification for nonphysical conditions, see note 7, *supra*, further demonstrates that courts and agencies can successfully administer broad modification provisions. Cf. *Peabody Coal Co.* v. *Gossett*, 819 S.W.2d 33, 35-36 (Ky. 1991) (discussing amended state statute).

Similarly, "a mere change in a claimant's wages," Pet. App. 3a, is insufficient to establish a "change in conditions" under Section 22. Section 8(h) of the LHWCA clearly states that the actual, post-injury wages of an employee who has sustained a partially disabling, non-schedule disability will establish the employee's wage-earning capacity only if the wages "fairly and reasonably represent" his wage-earning capacity. 33 U.S.C. 908(h). If they do not, an agency adjudicator

> may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h). Accordingly, in determining wage-earning capacity, the adjudicator considers such factors as "the beneficences of a sympathetic employer, the claimant's earning power on the open market, * * * [and] circumstances [that] indicate a probable work injury related wage loss in the future." *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984). An increase in wages resulting from inflation is insufficient to establish an increase in wage-earning capacity. See, *e.g.*, *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 61 (2d Cir. 1989).

As the Fourth Circuit recognized in *Fleetwood*, 776 F.2d at 1232, and the ALJ recognized in this case, relevant factors affecting the claimant's future earnings must be considered at both the initial hearing

and the modification hearing. The ALJ in this case observed that the worker's increased wages were not attributable solely to the effects of inflation and salary increases; that the worker was at no greater risk of losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. Pet. App. 16a. The Board additionally noted that the worker had completed vocational training (*id.* at 8a) and that he "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [his] increase in wage-earning capacity after the original award of benefits." *Id.* at 10a.

Thus, nothing in the Director's position, or in the decisions of the ALJ or the Benefits Review Board, suggests that modification under Section 22 follows automatically from a finding that the claimant's actual wages have increased; rather, a change in wage-earning *capacity* must be demonstrated to support modification. The court of appeals erred in concluding otherwise and in rejecting the Director's reasonable interpretation of the LHWCA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether Section 22 of the Longshore and Harbor Workers' Compensation Act permits modification of a compensation award when successful retraining and reemployment efforts increase the worker's earning capacity.

LIST OF PARTIES

The parties to the proceeding resulting in the decision below are:

John Rambo

Metropolitan Stevedore Company[1]; and

Director, Office of Workers' Compensation Programs, United States Department of Labor

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[1] In accordance with Rules 24.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 4

SUMMARY OF ARGUMENT 6

ARGUMENT 10

THE STATUTORY SCHEME 10

RAMBO AND *FLEETWOOD* CONTRASTED 13

THE MEANING OF "CONDITIONS" IS CLEAR 17

LEGISLATIVE HISTORY AND SUPREME COURT PRECEDENT 19

OPINIONS OF OTHER CIRCUITS 26

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES:

Amax Coal Co. v. Franklin, 957 F.2d 355 (7th Cir. 1992) 33

Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992) 32

Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968), *reh. den.* 391 U.S. 929 (1968) 24

Burley Welding Works, Inc. v. Lawson, 141 F.2d 964 (5th Cir. 1944) 14, 26, 30

Chapman v. Griffith-Consumers Co., 107 F.2d 263 (D.C. Cir. 1939) 34

Cohens v. Com. of Virginia, 19 U.S. 264 (1821) 8

Crowell v. Benson, 285 U.S. 22 (1932) 25

Director, Office of Workers' Compensation Programs v. Drummond Coal Co., 831 F.2d 240 (11th Cir. 1987), *reh. den.* 837 F.2d 1095 (1988) 33

Director, Office of Workers' Compensation Programs v. Edward Minte Co., Inc., 803 F.2d 731 (D.C. Cir. 1986) 34

Director, Office of Workers' Compensation Programs v. Rasmussen, 440 U.S. 29 (1979) 34

Eifler v. Office of Workers' Compensation Programs, 926 F.2d 663 (7th Cir. 1991) 33

Eller & Company v. Director, Office of Workers' Compensation Programs, No. 93-8095 33

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. ___, 112 S.Ct. 2589 (1992) 17, 18

TABLE OF AUTHORITIES – Continued

Page

Fleetwood v. Newport News Shipbuilding and Dry Dock Co., 776 F.2d 1225 (4th Cir. 1985) ..... *passim*

General Dynamics Corp v. Director, Office of Workers' Compensation Programs, 673 F.2d 23 (1st Cir. 1982) 14, 26

Godfrey v. Henderson, 222 F.2d 845 (5th Cir. 1955) ... 30, 31

Hole v. Miami Shipyard Corporation, 640 F.2d 769 (5th Cir. 1981) 31, 32

Jarka Corp. v. Hughes, 299 F.2d 534 (2d Cir. 1962) 28

LaFaille v. Benefits Review Board, 884 F.2d 54 (2d Cir. 1989) 28, 29

Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750 (1st Cir. 1992) 10

Lockheed Shipbuilding Co. v. Director, Office of Workers' Compensation Programs, 498 U.S. 1073 (1991) 10

McBride v. Eastman Kodak Co., 844 F.2d 797 (D.C. Cir. 1988) 10

McCormick S.S. Co. v. United States Employees Compensation Comm'n, 64 F.2d 84 (9th Cir. 1933) 8, 13, 30

O'Keeffe v. Aerojet-General Shipyards, Inc., 404 U.S. 254 (1971), *reh. den.* 404 U.S. 1053 (1972) 25

Pearce v. Director, Office of Workers' Compensation Programs, 647 F.2d 716 (7th Cir. 1981) 33

Pillsbury v. Alaska Packers Association, 85 F.2d 758 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) 13, 30

TABLE OF AUTHORITIES – Continued

Page

Port of Portland v. Director, Office of Workers' Compensation Programs, 932 F.2d 836 (9th Cir. 1991) 12

Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980) 6

Providence Washington Ins. Co. v. Director, Office of Workers' Compensation Programs, 765 F.2d 1381 (9th Cir. 1985) 12

Rambo v. Director, Office of Workers' Compensation Programs, 28 F.3d 86 (9th Cir. 1993) ..... *passim*

Randall v. Comfort Control, Inc., 725 F.2d 791 (D.C. Cir. 1984) 34

Standard Dredging Corp. v. Henderson, 150 F.2d 78 (5th Cir. 1945) 30

Stevens v. Director, Office of Workers' Compensation Programs, 909 F.2d 1256 (9th Cir. 1990) 10

Tidelands Marine Service v. Patterson, 719 F.2d 126 (5th Cir. 1983) 12

Verderane v. Jacksonville Shipyards, Inc., 772 F.2d 775 (11th Cir. 1985) 33

Washington Society for the Blind v. Allison, 919 F.2d 763 (D.C. Cir. 1990) 34

Washington Terminal Co. v. Hoage, 79 F.2d 158 (D.C. Cir. 1935) 33

Williams v. Jones, 11 F.3d 247 (1st Cir. 1993) 26, 27

STATUTES:

28 U.S.C. § 1254(1) 2

33 U.S.C. § 902(10) 2, 10, 11

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 902(18) 17

33 U.S.C. § 908(c)(1-20) 6

33 U.S.C. § 908(c)(21) ..... *passim*

33 U.S.C. § 908(g) 22

33 U.S.C. § 908(h) ..... *passim*

33 U.S.C. § 908(i) 20

33 U.S.C. § 908(j) 17, 22

33 U.S.C. § 909(b) 17

33 U.S.C. § 910 11

33 U.S.C. § 914(f) 12

33 U.S.C. § 918 12

33 U.S.C. § 919(d) 12

33 U.S.C. § 921(c) 5

33 U.S.C. § 921(d) 12

33 U.S.C. § 922 ..... *passim*

33 U.S.C. § 928 12

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BLACK'S LAW DICTIONARY 265 (5th ed. 1979) 18

Conference Report on S.38, Congressional Record-House, September 14, 1984, H.9592-9601 24

H.R. Rep. No. 1244, 73d Cong., 2d Sess. (1934) 20

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 98-570, 98th Cong., 1st Sess. (1984) 23

S. Rep. No. 588, 73d Cong., 2d Sess. (1934) 20

S. Rep. No. 1988, 75th Cong., 3d Sess. (1938)..... 21

S. Rep. No. 98-81, 98th Cong., 1st Sess. (1984) ...21, 22

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1986) 18

No. 94-820

In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Ninth Circuit (J.A. 75-78) is reported at 28 F.3d 86. The Order denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* (J.A. 79) is unpublished. The Decision and Order of the Benefits Review Board (J.A. 70-74) and the Decision and Order of the Administrative Law Judge (J.A. 63-69) are unreported.

JURISDICTION

The Decision of the United States Court of Appeals for the Ninth Circuit was filed on June 24, 1994. A timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing *En Banc* filed by Metropolitan was denied on August 10, 1994. The Petition for a Writ of Certiorari was filed on November 7, 1994, and granted on January 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2(10), 8(c)(21), 8(h), and 22 of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA" or "the Act"), 33 U.S.C. Sections 902(10), 908(c)(21), 908(h), and 922, provide in relevant part as follows:

> 2(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;. . . .
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> * * *
>
> 8(c)(21) In all other cases in this class of disability the compensation shall be 66-2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.
>
> * * *

8(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * *

Sec. 22. Upon his own initiative, or upon the application of any party in interest, (including an employer or carrier which has been granted relief under section 8(f), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commission may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 44(i)) in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a

new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

STATEMENT

John Rambo injured his back and leg on September 9, 1980. In November 1983, an Administrative Law Judge approved a stipulation that the injuries had lessened his weekly capacity to earn wages as a longshoreman by $120.24 and, pursuant to 33 U.S.C. Section 908(c)(21), awarded weekly benefits of $80.16[2] A few years later, Mr. Rambo became eligible for and completed necessary retraining, soon obtaining a position as a crane operator,

[2] The stipulation was that Mr. Rambo's injury had caused "an overall current permanent partial disability equivalent to 22½% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability." (J.A. 4)

a much higher paying and less physically strenuous position.[3]

Metropolitan sought modification of the original award, contending that continuing benefits were no longer appropriate because the retraining and successful search for work as a crane operator had increased Mr. Rambo's earning capacity to the point that his economic disability had ended. Mr. Rambo argued that his original award could be reduced only if his *physical* condition had improved.

The Administrative Law Judge rejected Mr. Rambo's argument, determined that his new skills and job had ended the adverse economic effects of the injury, and ordered benefits stopped.[4] The Benefits Review Board affirmed.

Mr. Rambo appealed to the United States Court of Appeals for the Ninth Circuit, basing jurisdiction upon 33 U.S.C. Section 921(c). The Court reversed the earlier decisions, rebuffed the arguments advanced by Metropolitan and the Director, rejected the Fourth Circuit's analysis in *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*,

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[3] The new skills generated earnings of $1,505.21 weekly at the time modification was granted, a figure nearly triple the wages earned before injury in less skilled longshore work. *Rambo*, 28 F.2d at 86, (J.A. 76).

[4] The Administrative Law Judge recognized that mere higher earnings are not determinative of a change in earning capacity and, after considering inflation rates, salary increases, the permanency of work as a crane operator, and the prospects for continued work if the present position were lost, found it "evident that the Claimant no longer has a wage-earning capacity loss." (J.A. 68)

776 F.2d 1225 (4th Cir. 1985), and ordered benefits continued at the original level because

> [A] mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition.

Rambo, 28 F.3d at 87 (J.A. 77). Requests for rehearing were filed by Metropolitan and the Director, OWCP. Both requests were denied and the accompanying Suggestions for Rehearing *En Banc* rejected.

SUMMARY OF ARGUMENT

Some loss of earning capacity is a prerequisite to any award of LHWCA compensation. Except in the situations in which the economic effects of injury are conclusively presumed,[5] proof that a work-related impairment has lessened the workers' ability to earn is essential. Without that proof, no statutory disability exists. Without disability, no award of compensation can be entered.

Despite the fact that the primary focus of the LHWCA is economic, the Ninth Circuit has ruled that compensation initially premised upon diminished earning capacity must continue at the same rate even after the

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[5] See 33 U.S.C. §§ 908(c)(1-20); *Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980).

lost ability to earn is regained unless – and only unless – the worker's *physical* condition improves.

The Ninth Circuit's interpretation of Section 22 is not only at odds with that of the Fourth. It violates the basic rule that courts must give effect to the clear meaning of statutes as written. It also strays far from the guidance provided by the past opinions of this Court, the most recent decisions issued by the other Circuit Courts and – most significantly – the history and intent of the Act itself.

Nothing in the history of the LHWCA or its many interpretations by this Court supports the view that Congress intended to distinguish between physical and economic conditions when it established the two prerequisites to award modification. Just as any mistake of fact may justify modification, so too does any change in the circumstances – the "conditions" – which together justified the original award suffice. As noted by Professor Larson,

> Although the beginning point and usually the main concern of an inquiry into change in condition for reopening purposes is claimant's relative physical condition, and although a number of states strictly confine change in condition to physical condition, [footnote omitted] it should not be forgotten that disability in the compensation sense has an economic as well as a medical component; [footnote omitted] accordingly a change in claimant's ability to get or hold employment, or to maintain his earlier earning level, could logically be considered a 'change in condition,' even though claimant's physical condition may have remained unchanged.

3 Larson, *The Law of Workmen's Compensation*, § 81.31(e), p. 15-1030 (1993).

The Ninth Circuit's opinion identifies two bases for its conclusion that physical change is a prerequisite to modification. The first – the canon of statutory construction that a lack of Congressional response to uniform court interpretations of statutory language implies approval – was misapplied. The decisions identified by the Ninth Circuit did *not* hold that physical change was a necessary prerequisite to adjustment of LHWCA awards.[6] This Court warned about the dangers of reliance upon *dicta* in *Cohens v. Com. of Virginia*, 19 U.S. 264, 369 (1821).

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and

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[6] For example, the Ninth Circuit panel characterized the holding in *McCormick S.S. Co. v. United States Employees Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), as requiring proof of change in a worker's physical condition. The actual holding in *McCormick* was both more narrow and, in this Petitioner's judgment, unassailable. McCormick S.S. Co.'s request to enjoin modification was granted because the worker had shown only a "decrease in wages earned" and failed to present any evidence of a "decrease in earning capacity." 64 F.2d, at 86. In addition, the *McCormick* decision contains an express acknowledgment that adjustments to existing awards of permanent partial disability may be properly ordered when changes in wage-earning capacity are proven.

> considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

The Ninth Circuit ignored that warning in this case.

The second underpinning of the Ninth Circuit's narrow interpretation of Section 22 must have been the unexpressed belief that Congress intended Section 22's scope to be narrow. The history of the LHWCA does not support this view.

Future changes to vocational circumstances are at least as likely as changes in physical condition. Either type of change can affect earning capacity and both may justify benefit adjustment. Absolutely nothing in the LHWCA's lengthy history implies that Congress intended that injured workers who "recover" economically should maintain the benefits lost to those who recover physically. Nothing in the history suggests that only the medically stable should suffer when the combined effects of injuries and changes in economic realities dramatically decrease earning abilities. The Ninth Circuit's opinion resulted from an over-focus on traditional rules of finality and *res judicata*. Those rules have been displaced by Section 22. If the prospect of an uncertain future troubles the parties, Congress has provided a single remedy: settlement.

In both legal and general usage, the normal meaning of "conditions" is "circumstances," precisely the term used by both House and Senate Committees in describing Section 22's scope. The Ninth Circuit should have applied this natural reading of the statute and recognized that

any change to any of the circumstances upon which a determination of wage-earning capacity depends may justify modification.

ARGUMENT

THE STATUTORY SCHEME

From its inception the purpose of the LHWCA has been to provide injured workers with compensation during periods of inability to earn earlier wages and has measured the amounts payable by the degree of economic harm sustained. The LHWCA's approach to determining the amounts payable as compensation for work-related injury was reviewed at length by this Court in *Potomac Electric Power Company, supra.*

The basic scheme is straightforward. Compensation is paid for "disability," an economic concept. Except in the so-called "scheduled" cases for which Congress has conclusively determined the degree of economic harm caused by injury, compensation is not payable under the LHWCA unless the injury lessens the employee's earning power. *See* 33 U.S.C. § 902(10); *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750 (1st Cir. 1992); *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988); *Fleetwood, supra*; and *Stevens v. Director, Office of Workers' Compensation Programs*, 909 F.2d 1256 (9th Cir. 1990), *cert. denied sub nom., Lockheed Shipbuilding Co. v. Director, Office of Workers' Compensaton Programs*, 498 U.S. 1073 (1991).

The amount of compensation payable is determined by the difference between the "weekly wage" calculated

in accordance with 33 U.S.C. Section 910 and the worker's post-injury earning capacity. "Earning capacity" is measured by actual post-injury earnings unless it is determined that actual earnings do not fairly and reasonably reflect earning power. In such cases, the Act requires the factfinder to consider the degree of physical impairment, the worker's customary employment, and "any other factors or circumstances in the case which may affect [the worker's] capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future" and fix a reasonable wage-earning capacity figure. *See* 33 U.S.C. § 908(h).

Except in cases involving "scheduled" injuries, the mechanism for measuring the duration of entitlement is as flexible and case-specific as that for determining the amounts payable. Benefits for the type of permanent partial disability originally awarded Respondent Rambo are "payable during the continuance of such partial disability," i.e., for as long as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" continues. 33 U.S.C. §§ 902(10) and 908(c)(21).

The current version of the LHWCA contains only one mechanism – Section 22 – for adjusting or terminating benefits payable pursuant to an award. If "change in conditions" or "mistake in a determination of fact" is demonstrated and unless the parties agree to an adjusted payment, formal hearing conducted by an Administrative Law Judge in accordance with the requirements of the Administrative Procedures Act must occur and the Administrative Law Judge must reapply Section 8(h), reassess the worker's permanent earning capacity, and if

that capacity to earn has changed, order an appropriate adjustment to the original award. 33 U.S.C. § 919(d). The scope of any appeal of the Administrative Law Judge's decision to the Benefits Review Board or a Court of Appeals is limited to a review for errors of law and adherence to the substantial evidence standard. *Port of Portland v. Director, Office of Workers' Compensation Programs*, 932 F.2d 836, 838 (9th Cir. 1991).

Any attempt by an employer to unilaterally lessen or terminate payments due in accordance with an existing award is subject to enforcement proceedings and the probable assessment of substantial penalties. 33 U.S.C. §§ 914(f), 918, and 921(d); *see also Tidelands Marine Service v. Patterson*, 719 F.2d 126 (5th Cir. 1983); *Providence Washington Ins. Co. v. Director, Office of Workers' Compensation Programs*, 765 F.2d 1381 (9th Cir. 1985). Whenever the worker prevails in a dispute about the amount or duration of benefit entitlement, the employer is responsible for the worker's attorney's fees. 33 U.S.C. § 928.

This structure practically precludes the torrent of modification proceedings which Respondent Rambo argues will result if "conditions" is not restrictively defined. The fear that every "hiccup" in the economy will be followed by modification of existing awards is unfounded because neither change of circumstance nor mistake of fact guarantees modification. Only a proven change in earning capacity can have that result. Few parties will seek modification and bear all or at least their own costs when transitory economic shifts have had no lasting effect on the injury-related disability. The absence of a flood of modification proceedings in the ten years following the Board's opinion in *Fleetwood* is a telling

challenge to the likelihood that Respondent Rambo's fears will materialize.

RAMBO AND *FLEETWOOD* CONTRASTED

The facts of the *Fleetwood* and *Rambo* proceedings are closely parallel, the results completely opposite. Mr. Fleetwood, a recipient of LHWCA benefits for lessened earning capacity, acquired new skills and a new, more remunerative job. An Administrative Law Judge determined that Mr. Fleetwood's earning capacity had improved to a degree which extinguished the earlier loss and terminated benefits. The Benefits Review Board affirmed and Mr. Fleetwood appealed, arguing that modification pursuant to Section 22 was available only if his *physical* condition had changed.

The Fourth Circuit carefully distinguished the cases upon which Mr. Fleetwood relied and rejected his argument because "it is not in keeping with the purpose of the Act, which is to compensate workers for injuries that affect their wage-earning capabilities." *Fleetwood, supra,* at 1228-29. Presented with strikingly similar circumstances and the identical argument, the Ninth Circuit harkened back to its 60-year-old opinion in *McCormick S.S. Co. v. United States Employees' Compensation Commission,* 64 F.2d 84 (9th Cir. 1933), mischaracterized the true holding of that case,[7] and, without any discussion of statutory purposes or policies, reached the opposite result.

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[7] McCormick proves on careful reading to stand only for the unassailable proposition that a change in wages does not *necessarily* represent a change in earning capacity. The other Ninth Circuit precedent referenced in the decision below, *Pillsbury v. Alaska Packers Association,* 85 F.2d 758 (9th Cir. 1936), *rev'd*

The Ninth Circuit's single-page analysis asserted that its conclusion, although different from that reached by the Fourth Circuit, was consistent with the views of the First and the Fifth.

> The Fourth Circuit's rule conflicts with the positions taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor,* 673 F.2d 23, 25, n.6 (1st Cir. 1982) ('Courts uniformly have held that a "change in conditions" . . . means a change in the employee's *physical* condition, not other conditions.' (emphasis in original)); *Burley Welding Works, Inc. v. Lawson,* 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury,* and holding that '[i]t has been uniformly held that the term "change in conditions" . . . means a change in the employee's *physical condition,* and not other conditions.' (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

Rambo, supra, at 88 (J.A. 78).

The Court was at least partially mistaken. *Burley* is almost certainly no longer the law within the Fifth Circuit. The continuing validity of *General Dynamics* is doubtful. If there is a "clear weight of authority," it probably sides with *Fleetwood,* not *Rambo.* A discussion of the law in other Circuits appears at pages 27 to 35 of this brief.

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on other grounds, 301 U.S. 174 (1937), also involved no debate between changes in economic or physical conditions.

The Ninth Circuit did not discuss the policy implications of its requirement that physical change underlie modification. It did not explain why a worker with deteriorating physical problems should be entitled to increased benefits while an injured worker equally harmed by a changing economic environment should be denied similar relief. The Court provided no rationale for lessening the liability of employers when *physical* rehabilitation efforts succeed while refusing a similar adjustment when the development of new skills or the provision of reasonable accommodations to the worker's limitations assures continued employment. The Court offered no justification for continuing benefit payments to a worker who has fully regained his or her lost ability to earn.

The Fourth Circuit persuasively addressed each of these points.

> Under the Act, 'disability' is defined as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' 33 U.S.C. § 902(10). Thus, the Board was correct when it concluded that a worker is not compensated solely for physical impairment, but rather the worker is compensated for the future economic loss attributable to the physical impairment. The worker initially must prove his loss of wage-earning capacity to obtain benefits; therefore, his wage-earning capabilities should be relevant when considering a modification of an award. Thus, for example, if an employee initially was awarded a 40-percent partial disability award, and later found that his wage-earning

> capacity was much less than originally determined, he could then seek a modification. Likewise, an employer who finds that an employee's wage-earning capacity has not been affected to the degree originally determined should be able to seek a modification. As this case demonstrates, it is possible for a worker to show no physical improvement, but at the same time to acquire new job skills that enable him to compete again in the workforce. A sensible modification procedure would allow employees whose loss of wage-earning capacity becomes more apparent over time to obtain a larger disability award at a later date without requiring such an employee to demonstrate that his physical condition caused by the accident had changed. We fail to see how an employee whose wage-earning capacity had declined could be treated differently from the employee whose wage-earning capacity had improved without rendering inconsistent interpretations of the same statutory section of the LHWCA.
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> Without such a modification procedure, workers who had secured new skills and employment would be receiving disability compensation when they were not disabled and an unequitable distribution of limited financial resource would result. . . . Overall, the statutory scheme indicates that as long as an employee's physical injury affects his wage-earning capacity, he should be able to obtain disability payments; but, he should not be able to receive a stream of constant payments regardless of his wage-earning capacity.

Fleetwood, supra, at 1229.

Only the Fourth Circuit's interpretation of Section 22 is consistent with the LHWCA's focus on earning capacity and the clear need for modification avenues in other contexts.[8] The Fourth Circuit's opinion both encourages and rewards the retraining and reemployment of injured workers. The Ninth Circuit's conclusion discourages that most effective remedy for economic loss.

THE MEANING OF "CONDITIONS" IS CLEAR

> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.
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> * * *
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> The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.

Estate of Cowart, at 2594.

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[8] LHWCA benefits for death are clearly intended to terminate upon the spouse's remarriage or end of a child's "student" status. *See* 33 U.S.C. §§ 909(b) and 902(18). If Section 22 requires physical change, the only route to an order terminating payments is unavailable. Post-award earnings must be reported on pain of benefit forfeiture. 33 U.S.C. § 908(j). If only physical change may justify benefit modification, no means of enforcing the reporting requirement exists. Some third-party settlements will require valuation of LHWCA entitlements and comparison with amounts received to determine appropriate credits and, in some instances, resolve disputes about forfeiture. *See* 33 U.S.C. § 933 and *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. ___, 112 S.Ct. 2589 (1992). A limited construction of "conditions" closes the only route to the necessary formal hearing.

This basic principle of statutory construction governed this Court's 1992 interpretation of the phrase "person entitled to compensation" and is no less applicable to the construction of Section 22's "change in conditions."[9]

In general usage, the normal meaning of "conditions" includes all circumstances attendant to the issue at hand.[10] Legal usage is more precise, defining "condition" as "a future and uncertain event upon the happening of which is made to depend the existence of an obligation." BLACK'S LAW DICTIONARY 265 (5th ed. 1979). Neither Webster nor Black distinguishes physical from other circumstances or possible events.

The issue at hand is earning capacity, a condition most dependent upon economic factors. Both physical and economic change qualify as "future and uncertain events" critical to the continuance of the payments needed to replace lost earning power.

Section 22 is no less clear than Section 33. The plain language rule should govern. "Conditions" should be construed in a manner consistent with Section 8(h), inclusive of all "circumstances in the case which may affect

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[9] *Cowart* also noted the fact that the "plain language rule" can sometimes collide with the rule requiring judicial deference to reasonable administrative interpretations. *Cowart, supra,* at 2594. That conflict is not present in this proceeding. The federal Respondent interprets Section 22 in the same manner argued by Petitioner Metropolitan.

[10] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1986) defines the plural "conditions" as "attendant circumstances" and reports the closest synonym of the most common usage of the singular to be "prerequisite."

[the worker's] capacity to earn wages in his disabled condition."

LEGISLATIVE HISTORY AND SUPREME COURT PRECEDENT

The history of the LHWCA and its several amendments contains no "smoking gun." It does, however, offer no support for the Ninth Circuit's construction and generally supports the conclusion that Congress intended that modification efforts be permitted to proceed whenever any change in any of the circumstances attendant to the original award are proven to have occurred.[11]

The Committee Reports to the 1934 amendments to Section 22 are identical. Both demonstrate Congress's latitude about the permissible grounds for modification and its continuing insistence that the time within which modification could be sought should be strictly limited.

> Section 5 of S.2794 [H.R. 8057] amends section 22 of the existing Act [by adding "mistake in a determination of fact"] so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the time period, extends the time within which such modification may be made. . . . [and] permits an increase or decrease in the compensation under a modifying award when changed conditions or a mistake in a determination of

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[11] As discussed, *supra*, at 10-13, neither proof of changed circumstances nor proof of factual error assures modification. Such proof simply permits the formal hearing process and a reassessment of the worker's current earning capacity and compensable disability.

> fact makes such modification desirable in order to render justice under the Act. . . .

S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934).

In 1938, Congress not only amended Section 22 by assuring that modification authority existed in situations in which there had been a prior rejection of the claim, it also enacted current provisions 8(h) and 8(i), 33 U.S.C. Sections 908(h) and 908(i). The reports accompanying those changes demonstrate Congress's concerns about the long-term impact of injury upon workers' future abilities to earn, the expectation that modification rights existed if the post-injury earning power changed, and the belief that settlement was the best means of achieving finality and avoiding continuing readjustments to awards over long periods of time.

> [The proposed amendment adding subdivision (h) to Section 8] also provides for consideration of the effects of an injury, causing permanent partial disability, upon the employee's future ability to earn. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. . . . considering not only the present effect of the disability on the employee's wage-earning capacity but also the future consequences of such disability on the employee's capacity to earn as it naturally extends into the future.
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> * * *
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> In a case such as that referred to above where the employee returns to employment without

> apparent wage loss, notwithstanding impairment of physical condition and probable impairment of future wage earning capacity, an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the limitations in the Act with respect to the filing of the claim for compensation and the right of review of the case (sec. 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the beneficent provisions of the Longshoremen's Act.
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> * * *
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> The suggested addition of subdivision (i) to section 8 is designed to afford the interested parties the opportunity of amicably disposing of cases upon agreed settlements approved by the deputy commissioner, after approval by the Commission, where awards have been made under section 8(c)(21) and section 8(e). Experience shows that in many cases involving disabilities under these provisions (by which compensation is based on loss of earning capacity and is subject to readjustment from time to time over long periods) agreed settlements as approved by the deputy commissioner, with approval of the Commission, would be desirable and in the interest of all parties concerned.

S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938).

The next arguably relevant legislative history appears in the reports which accompanied the 1984 amendments to the LHWCA. The first of these reports, Senate Report No. 98-81, described the pertinent proposed amendments as intended to (a) assure that the sole

route to benefit adjustment was that provided by Section 22,[12] (b) reduce speculation about potential future losses of earning capacity, (c) broaden settlement authority, (d) impose income reporting requirements and the penalty of benefit loss for failure to report, and (e) remove existing time limitations on modification requests.

The Senate Bill proposed making vocational rehabilitation mandatory because "one of the prime purposes of workers' compensation [is] to return the injured worker to the labor market." The repeal of Section 22's time limitations in return for deletion of the language in Section 8(h) permitting too much speculation about future events was proposed to reduce the frequency of *de minimis* awards and to allow "claimants, for example, to apply for increased benefits for wage loss or for greater physical disability at a time when the full effects of an injury manifest themselves." *See* S. Rep. No. 98-81, 98th Cong., 1st Sess. 18, 36-38, 43-44 (1984).

Although it proposed amendments to other sections of S.38, the House Committee on Education and Welfare accepted the Senate's proposed revisions to Sections 8(h) and 22 and the Senate's proposal to enact Section 8(j). The Senate's efforts to amend Section 8(g) of the existing Act

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[12] As noted in *McCormick*, the version of Section 8(c)(21) in effect from 1927 until 1984 expressly permitted reconsideration of wage-earning capacity determinations and contained no time limitation. The history does not suggest that the repeal of Section 8(c)(21)'s language in 1984 was intended to restrict the grounds for modification. Instead, the apparent goal was to assure that all routes to award adjustment be governed by Section 22 and the Act's contested case provisions.

to make vocational rehabilitation mandatory and to forbid entry of an award for permanent disability until rehabilitation has been completed or determined unnecessary were not accepted. Pertinent portions of the House Report's section-by-section analysis echoed that of the Senate and characterized the grounds for modifications to be "changed circumstances or mistakes." In describing the proposed repeal of Section 22's one-year time limitations, the Committee expressed its intention that "the grounds for seeking a modification remain as they are under current law."[13] H.R. Rep. No. 98-570, 98th Cong., 1st Sess. 18, 27-29.

The Joint Explanatory Statement of the Committee of Conference issued on September 14, 1984 reported that mandatory vocational rehabilitation proposals were dropped because of differences between the House and the Senate regarding the extent to which "religious tenets" might justify refusal to participate. The conferees offered no explanation for their apparent agreement to repeal the reconsideration language of Section 8(c)(21), maintain the existing language in Section 8(h), and retain

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[13] Any contention that this reference qualifies as an endorsement of pre-*Fleetwood* law is weakened when it is recalled that the Benefits Review Board's opinion in *Fleetwood* was issued three months before the Conference Committee met and reported. If that opinion had been thought to effect a major change contrary to Congress's earlier expressions of understanding, surely there would have been some discussion by the conferees. It is more likely that the reference to existing standards was addressed to this Court's past decisions and the broad modification authority those cases confirmed. In any event, the statement is too ambiguous to overcome both the plain language rule and the balance of the history.

the one-year limitation in Section 22. Conference Report on S.38, Congressional Record-House, September 14, 1984, H.9592-9601.

As finally enacted, the 1984 amendments did not make participation in vocational rehabilitation mandatory and did not repeal any portion of Section 8(h). The unrestricted authority formerly extended Deputy Commissioners to adjust awards for permanent partial disability was folded into Section 22, and made subject to that section's continued one-year time limitation.

Read as a whole, the history of the Act and its amendments generally supports the view that Congress has consistently intended that awards of compensation for permanent partial disability be adjustable to changing factual circumstances, limited only by the strict one-year time limitation. Nothing in the history demonstrates an intent to limit "conditions" to only the worker's physical condition. Nothing in the history reflects a rejection of this Court's opinions that Section 22 displaces traditional principles of finality and *res judicata* and that Congress's reference to the alternate ground for modification – "a mistake in a determination of fact" – is inclusive of *all* facts.

> We find nothing in this legislative history to support the respondent's argument that a 'determination of fact' means only some determinations of fact and not others.

Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 465 (1968), *reh. den.* 391 U.S. 929 (1968).

> Thus, on its face, the section permits a reopening within one year 'because of a mistake in a

> determination of fact.' There is no limitation to particular factual errors, or to cases involving new evidence or changed circumstances. The Act at one time did authorize reopening only on the 'ground of a change in conditions,' 44 Stat. 1437, but was amended in 1934 expressly to 'broaden the grounds on which a deputy commissioner can modify an award . . . when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the act.' S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934). The plain import of this amendment was to vest a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

O'Keeffe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 255-56 (1971), *reh. den.* 404 U.S. 1053 (1972).

Any mistaken factual determination can serve as grounds for modification. Whether the fact is one of a physical or economic nature matters not. That has been the rule for nearly thirty years – more than sixty if the distinction between jurisdictional and all other facts is ignored. *See Crowell v. Benson*, 285 U.S. 22 (1931). Absent a clear intention to define "conditions" much more narrowly than "fact," an equally broad construction must be given the alternative ground for modification. No such intent is expressed in the history. None should be inferred.

OPINIONS OF OTHER CIRCUITS

Although only the Fourth and the Ninth Circuit Courts of Appeal have directly addressed the question presented by this proceeding, the First, Second, Fifth, Seventh, Eleventh, and District of Columbia Circuits have issued opinions which shed light on their respective views. Petitioner has identified no decisions from the Third, Sixth, Eighth, or Tenth Circuits which provide any substantial assistance.

First Circuit Court of Appeals

Citing only *Burley Welding Works v. Lawson*, 141 F.2d 964 (5th Cir. 1944), in a footnoted comment clearly *dicta* to the actual holding that "courts uniformly have held that a 'change in conditions' means a change in the employee's physical condition, not other conditions," the First Circuit's opinion in *General Dynamics Corporation v. Director, Office of Workers' Compensation Programs*, 673 F.2d 23, 26, at n.6 (1st Cir. 1982), was one of the cases identified by the Ninth as supportive of its narrow construction of Section 22. *Rambo*, however, did not mention the First Circuit's subsequent commentary in *Williams v. Jones*, 11 F.3d 247 (1st Cir. 1993).

Williams involved an enforcement action brought in federal district court by an injured worker. The employer raised equitable defenses, arguing that the award had been obtained by recently discovered fraud. The District Court granted the petition for modification. Although that order was vacated because service of process was found insufficient, the Court affirmed the refusal to grant

equitable relief because it thought that Section 22 itself provided an adequate remedy for redressing any fraud.

> The LHWCA affords Jones an adequate remedy for redressing any fraud alleged in the affirmative defense. Eschewing conventional res judicata principles, section 922 allows an employer to request the ALJ to reconsider the case where there has been a 'change of conditions' or 'mistake of fact' warranting modification or suspension in compensation payments. See 33 U.S.C. Sec. 922; see also 20 C.F.R. Sec. 702.373; *Hudson v. Southwestern Barge Fleet Servs., Inc.*, 16 Ben.Rev.Bd.Serv. 367, 369 (1984) (holding that Sec. 922 was 'intended by Congress to displace traditional notions of res judicata') citing *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968)). (FN16) '[F]acts relating to the nature and extent of a claimant's disability typically are the subject of modification proceedings.' *Williams v. Geosource, Inc.*, 13 Ben.Rev.Bd.Serv. 643, 645 (1982). 'The factfinder [ALJ] has broad discretion to correct mistakes of fact, whether they be demonstrated by new evidence, cumulative evidence, or further reflection upon the evidence initially submitted.' *Id.* (emphasis added). The overarching criterion for reopening a compensation award under the LHWCA is whether reexamination would serve the 'interests of justice.' *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-56, 92 S.Ct. 405, 406-07, 30 L.Ed.2d 424 (1971).

Williams, supra, at 257.

Although issued in the context of a "mistake of fact" modification analysis, it is difficult indeed to read into this passage anything other than the fundamental view

that Section 22 was intended to be read broadly and to fully displace traditional principles of finality and *res judicata.*

Second Circuit Court of Appeals

The Second Circuit almost certainly stands with the Fourth in its reading of the LHWCA's modification provision. In *Jarka Corp. v. Hughes,* 299 F.2d 534 (2d Cir. 1962), the Court struck down a modification order because the District Commissioner's findings were insufficient, remanding for further proceedings consistent with a discussion of Section 22 strongly indicative of the view that "mistake of fact" and "change in conditions" were equally broad.

Whatever doubts about the Second Circuit's modification standards might have remained following *Jarka* were greatly lessened by *LaFaille v. Benefits Review Board,* 884 F.2d 54 (2d Cir. 1989). Discussing the propriety of a *de minimis* award if on remand the Administrative Law Judge found no current loss of wage earning capacity, the Court stated as follows:

> Section 22 provides that an award that denies continuing compensation may be modified at any time within one year after the last payment of compensation on the ground either of a 'change in conditions' since the order or of mistake in the original determination of disability. Thus, '[a]n initial finding of no economic disability . . . may only be modified within one year of such finding, even though subsequent events make it apparent that the claimant has

suffered severe economic harm.' *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 772 (5th Cir. 1981).

Because of the 'potentially harsh effect of this relatively short statute of limitations,' where a physically impaired worker's potential right to compensation for the substantial loss of future earnings is a predictable probability, even if it is not a certainty at the time of hearing, de minimis awards have been approved in order to avoid the short statute of limitations of Sec. 22. *Id.* The court in *Hole* expressly held that concern for the avoidance of an irremediable error precluding future relief is appropriate under the LHWCA and under Sec. 8(h). Similarly, in *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984), the court not only agreed with *Hole* that such awards were permissible, but also held that they should be made where the evidence shows a significant permanent physical impairment without a present loss of earnings.

Because the ALJ found that LaFaille sustained a 'permanent injury, a progressive obstructive lung disorder,' '[was] restricted in performing some of the physical aspects of the job of welder' and was spared demanding physical exertion by the kindness of his employer and co-workers in his job after he left General Dynamics, there is substantial evidence that he is likely to suffer a future loss of earnings as his condition deteriorates or when his environment changes. A finding of no economic disability and a denial of a de minimis award would prevent him from filing for future benefits for losses in earning capacity occurring after the one-year limitation of Sec. 22.

LaFaille, supra, at 62.

Unless it retreated substantially from this discussion, it is probable that the Second Circuit would conclude that change in a worker's employment "environment" is a sufficient basis for modification. It is far less likely that it would write into "change in conditions" a proviso excluding all but the physical.

Fifth Circuit Court of Appeals

Home to *Burley*, one of the principal cases thought by the Ninth Circuit to restrict modification to physical change,[14] the Fifth Circuit almost certainly lines up with the Fourth. From 1945 to 1994, all relevant decisions have confirmed the breadth of Section 22.

In *Standard Dredging Corp. v. Henderson*, 150 F.2d 78 (5th Cir. 1945), the Court concluded that Section 22 was the appropriate statutory basis for terminating death benefits on the ground that the dependent status of survivors had changed and that benefits payable "during such dependency" should end or lessen. In *Godfrey v. Henderson*, 222 F.2d 845 (5th Cir. 1955), both the majority and dissenting opinions clearly shared the view of Section 22

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[14] *Burley*, carefully read, stands only for the unassailable proposition that higher wages do not "conclusively establish" a change in earning capacity. Its statement that "it has been uniformly held that 'change in conditions' . . . means a change in the employee's physical conditions, and not other conditions" was not essential to the ruling and was itself premised upon *McCormick S.S. Co. v. United States Employees Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), and *Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937), both of which are discussed above, at pages 14-15, n.7

later expressed in *Fleetwood*.[15] And, of course, the basic premise of *Hole v. Miami Shipyard Corporation*, 640 F.2d 769 (5th Cir. 1981), is wholly inconsistent with the Ninth Circuit's analysis of Section 22.

An Administrative Law Judge awarded Gordon Hole benefits for a 1% permanent partial disability because he could not accurately assess his earning capacity and thought it best to keep the case alive for later modification if a demonstrable change in earning capacity occurred. The Benefits Review Board reversed because it thought the award too speculative and violative of Section 22's one-year limitation on modification. The language chosen by the Fifth Circuit in reversing the Board makes express the Fifth Circuit's current, expansive interpretation of Section 22.

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[15] After concluding that the Deputy Commissioner's determination that Mr. Godfrey was totally disabled was supported by substantial evidence, the majority specifically noted that further adjustments to the award were possible.

> Should it develop in the future that he can obtain employment, it would then be time to revise the original order.

Godfrey, supra, at 849.

Although the dissenting judge challenged what he felt was the majority's *de novo* review of the factual record, he also emphasized the liberality of Section 22 and the prospects for further modification.

> With this in mind and also in mind that the commissioner may, indeed must, if conditions change, reconsider and again modify his award, I do not see how we can, under the controlling rule of law which the majority opinion correctly sets out, upon this record, set aside the finding and award of the commissioner.

Godfrey, supra, at 849 (dissenting opinion).

> The LHWCA does not provide compensation to injured workers for physical injuries standing alone but only for 'disability,' defined by 33 U.S.C. § 902(10) as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' However, it will often be impossible at the time a claim is filed to determine the *precise* degree of economic harm suffered by a claimant. Therefore, 33 U.S.C. § 922 provides that an award of compensation may be modified at any time within one year after the last payment of compensation. Such a modification may be made either on the ground of changed conditions or on the ground of a mistake in the original determination of disability. Thus, if an initial determination is made that a claimant has suffered some degree of economic harm, however slight, and circumstances later develop indicating that the claimant was harmed to a greater or lesser degree than was originally apparent, the compensation award may be modified years later to reflect this greater or lesser economic injury.

Hole, supra, at 772. *See also Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, at 1046, n.6 (5th Cir. 1992), approving *Fleetwood* as in keeping with the purposes of the Act.

Whatever may be the validity of a rule that Section 22's one-year limitation period may be extended whenever thought unfair, the approval of *de minimis* awards *must* reflect agreement with *Fleetwood's* modification analysis.

Seventh Circuit Court of Appeals

The Seventh Circuit's decisions are mixed and not particularly instructive. *Eifler v. Office of Workers' Compensation Programs*, 926 F.2d 663 (7th Cir. 1991), presumes that physical change is required for modification. On the other hand, *Pearce v. Director, Office of Workers' Compensation Programs*, 647 F.2d 716, at 727, n.16 (7th Cir. 1981), suggests that changes in interest rates may qualify as a "change in conditions." *Amax Coal Company v. Franklin*, 957 F.2d 355, at 358 (7th Cir. 1992), acknowledges that "the reopening provision is to be interpreted generously" but implies that the generosity was intended to extend only to the claimant.

Eleventh Circuit Court of Appeals

Although far from necessary to their holdings, *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, at 780 (11th Cir. 1985), and *Director, Office of Workers' Compensation Programs v. Drummond Coal Co.*, 831 F.2d 240, at 246, n.9 (11th Cir. 1987), *reh. den.* 837 F.2d 1095 (1988) do state that "change in conditions" refers to a change in an employee's physical condition. The First Circuit's opinion in *General Dynamics* is offered as support for this characterization of the statute. The issue presented in this proceeding is now pending before the Eleventh Circuit in *Eller & Company v. Director, Office of Workers' Compensation Programs*, No. 93-8095.

District of Columbia Circuit

The District of Columbia Circuit appears aligned with those approving *Fleetwood's* analysis. In *Washington Terminal Co. v. Hoage*, 79 F.2d 158, at 160-61 (D.C. Cir.

1935), the Court concluded that modification was appropriate despite no change in physical condition when a claimant started to use glasses after receiving an award for uncorrected vision loss. The decision in *Chapman v. Griffith-Consumers Co.*, 107 F.2d 263, at 266 (D.C. Cir. 1939), characterized the delayed appearance of persons entitled to death benefits as a "change in conditions" sufficient for modification of an order requiring payment of "in lieu of dependents" money to the Special Fund. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, at 794 (D.C. Cir. 1984), specifically adopted *Hole's de minimis* analysis and, necessarily, *Fleetwood's* reading of "change in conditions."

Hoage, Chapman, and *Randall* are not mentioned when the Court, in later *dicta,* cited *Verderane* and *General Dynamics* for the view that "conditions" encompassed only "physical condition." *See Director, Office of Workers' Compensation Programs v. Edward Minte Co., Inc.*, 803 F.2d 731, at 735 (D.C. Cir. 1986). A similarly unnecessary and conclusory characterization appears in *Washington Society for the Blind v. Allison*, 919 F.2d 763, at 769, n.46 (D.C. Cir. 1990).

CONCLUSION

As used in Section 22, "conditions" is intended to encompass all of the circumstances determinative of earning capacity. Neither plain usage nor the history and purposes of the LHWCA permit a construction which both strips the chosen term of its plural form and inserts a limiting *proviso* not selected by Congress. To paraphrase this Court's concluding comment in *Director, Office of*

Workers' Compensation Programs v. Rasmussen, 440 U.S. 29, 47 (1979), when Congress has put down its pen, a court may neither rewrite Congress's words nor insert additional terms.

The Administrative Law Judge determined that Respondent Rambo's vocational skills and job opportunities had changed following the date of the original award. He found that these changes had increased Respondent Rambo's earning capacity to a degree that he no longer experienced a compensable disability and, as instructed by the statute, terminated benefits. All findings were supported by substantial evidence. The termination of benefits based upon a "change in conditions" was in accordance with law. The Ninth Circuit's opinion must be reversed.

DATED: February 22, 1995.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF ON THE MERITS FOR RESPONDENT RAMBO

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QUESTIONS PRESENTED

1. Must a party seeking a 33 *U.S.C.* Section 922 Modification of an Award of Permanent Partial Disability prove that the Claimant has undergone a change in "physical condition"?

2. Should the employer's Application For Modification be denied because of the representations of its attorney to the injured worker that the award would be paid for life? (S. Ct. Rule 15.1)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT AND AUTHORITIES 10

I. NEITHER THE OPINION OF THE BENEFITS REVIEW BOARD NOR THE DIRECTOR IS ENTITLED TO DEFERENCE IN THIS CASE... 10

II. LEGISLATIVE HISTORY, PRECEDENT AND THE PRACTICAL ADMINISTRATION OF THE ACT MANDATE THAT THIS COURT AFFIRM THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN THIS CASE 12

III. OTHER ISSUES RAISED BY RAMBO ON APPEAL AND ON WRIT OF CERTIORARI ... 35

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Atlantic Coast Shipping Co. v. Golubiewski, 9 F. Supp. 315 (D.Md. 1934) 16, 17, 19, 20

Bay Ridge Operating Co. v. Lowe, 14 F. Supp. 280 (S.D. N.Y. 1936) 22

Burley Welding Works, Inc. v. Lawson, 141 F.2d 964 (5th Cir. 1944) 21

Chevron U.S.A. Inc., v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984) 12

Director, Office of Workers' Compensation Programs v. General Dynamics Corp., 900 F.2d 506 (2nd Cir. 1990 10

Director, Office of Workers' Compensation programs v. O'Keefe, 545 F.2d 337 (3rd Cir. 1976) 10

Fleetwood v. Newport Shipbuilding & Dry Dock Co., 776 F.2d 1225 (4th Cir. 1985) ... 4, 8, 9, 31, 32, 33, 34, 35, 36

General Dynamics v. Director, Office of Workers' Compensation Programs, 673 F.2d 23 (1st Cir. 1982) 10, 11, 27

Jarka Corp. v. Hughes, 299 F.2d 534 (2nd Cir. 1962) 22

McCord v. Cephas, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976) 6

McCormick, S.S. Co. v. United States Employees' Comm'n, 64 F.2d 84 (9th Cir. 1933) ..... *Passim*

Malcomb v. Island Creek Coal Company, 15 F.3d 364 (4th Cir. 1994) 11

TABLE OF AUTHORITIES – Continued

Page

Pillsbury v. Alaska Packers Ass'n, 85 F.2d 758 (9th Cir. 1936), rev'd on other grounds, 301 U.S. 174 (1937) 20, 21

Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980) 10

Rizzi v. The Four Boro Contractor Corp. 1 BRB 130 (1970) 21, 22

Verderane v. Jacksonville Shipyards, Inc., 772 F.2d 775 (11th Cir. 1985) 27

Western v. Luther, 163 U.S. 331 (1896) 12, 35

STATUTES

33 *U.S.C.* Sec. 901 ..... 1, 29

33 *U.S.C.* Sec. 902 17

33 *U.S.C.* Sec. 908 ..... 11, 27

33 *U.S.C.* Sec. 922 ..... 4, 5, 14, 16, 20, 31, 35

33 *U.S.C.* Sec. 944 11

OTHER AUTHORITIES

3 *Larson, The Law of Workmen's Compensation*, Sec. 81.00 et seq. 15-956-15-1016 (1994) 29, 30, 31

Conference Report on S. 38, Congressional Record – House, September 14, 1984, H. 25495 25

Congressional Record – Senate, 98th Cong., 1st Sess. January 26, 1983, S.570 23

Congressional Record – Senate, 98th Cong., 1st Sess., January 26, 1983, S.576 23

TABLE OF AUTHORITIES – Continued

Page

Congressional Record – Senate, 69th Cong., 2d. Sess., March 4, 1927, S.5904 13

H.R. Rep. No. 1244, 73d Cong., 2d Sess. (1934) 16

H.R. Rep. No. 1767, 69th Cong., 2d Sess. (1927) 13

H.R. Rep. No. 2237, 74th Cong., 2d Sess. (1936) 20

H.R. Rep. No. 98-570, 98th Cong., 1st Sess. (1983) 25

S. Rep. No. 588, 73d Cong., 2d Sess. (1934) 16

S. Rep. No. 1199, 74th Cong., 1st Sess. (1935) 20

S. Rep. No. 1988, 75th Cong., 3d Sess. (1938) 20

S. Rep. No. 98-81, 98th Cong., 1st Sess. (1983) 8, 23, 24

No. 94-820

In The

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October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF ON THE MERITS FOR RESPONDENT RAMBO

STATEMENT OF THE CASE

The Respondent, John Rambo, ("Rambo") a longshore frontman was injured within the course and scope of his employment on September 9, 1980 while employed by Petitioner, Metropolitan Stevedore Company, ("Metropolitan").

His claim for a non-scheduled permanent partial disability pursuant to 33 *U.S.C.* Section 901 *et seq.*, the *Longshore and Harbor Workers' Compensation Act* (hereinafter, "The Act") was set for Trial in 1983 before his Honorable Administrative Law Judge James J. Butler. Rambo was

represented by counsel and the employer was represented by James J. Wood. Among other things, the parties stipulated:

> "2. That . . . John Rambo . . . was employed as a longshoreman (frontman) by Metropolitan on September 9, 1980, on which occasion he sustained an injury arising out of and occurring in the course of his employment to his back and leg."; and,
>
> "6. That the employee sustained an overall current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an 'economic disability' producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability."

(J.A. 3-4).

On November 28, 1983, his Honorable Administrative Law Judge, William J. Butler, issued a Decision and Order awarding Rambo $80.16 per week permanent partial disability benefits. (J.A. 2-6)

On October 30, 1989, "Metropolitan" filed with the Department of Labor an "Employer's Application For Modification, Section 922". (J.A. 7-10)

The Modification contained no medical evidence and did not allege a change in Rambo's physical condition. The sole evidence offered by the employer in support of the Modification was Rambo's post award earning records. (J.A. 9-10). The employer alleged, " . . . that he (Rambo) is not entitled to a wage loss of any kind at this time and that he has no economic disability as a result of this injury." (J.A. 8). The employer concluded that,

" . . . we can clearly show simply by the earnings information alone, . . . that this employee does not have a wage loss now . . . and that all compensation payments should be terminated." (J.A. 8,9).

A Formal Hearing on the Modification was convened on October 15, 1990 by his Honorable Administrative Law Judge Daniel Stewart ("ALJ").

At the commencement of the hearing, Rambo moved to dismiss the Application for Modification on the ground that the "Modification" failed to allege nor was there evidence of a change in Rambo's "physical condition". (J.A. 25-26).

The employer argued that:

1. A Section 922 Modification may be based on economic grounds (J.A. 28 and J.A. 41, Employer's Trial Brief); and,

2. Rambo's earnings demonstrate that there is no economic disability in this case. (J.A. 41)

The only documentary evidence admitted into the record was Rambo's earnings records. Each party's trial brief was made part of the Administrative Record. The employer's only witness was Rambo.

Rambo testified that he was currently employed as a longshoreman in the capacity of a crane operator. (J.A. 43). It took Rambo 20 years to achieve the seniority necessary to become a crane operator. (J.A. 52). A crane operator's job is less physically demanding then other longshore work he is eligible to perform. (J.A. 53).

Rambo testified that his physical condition had not changed since the date of the award of compensation benefits in 1983.

(J.A. 54).

Finally, Rambo testified that he was told by Mr. James J. Wood at the 1983 trial that if he accepted the sum of $80.16 per week, it would be paid for life. (J.A. 56-62).

In Open Court, on the record, Mr. Wood said:

> "Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I guess."

(J.A. 58).

Mr. Wood did **not** call himself as a witness to deny Rambo's testimony. The only evidence in the record on this issue is the testimony of Rambo.

The "ALJ" granted the Modification and terminated Rambo's benefits.

Rambo appealed to the Benefits Review Board.

The Benefits Review Board, citing *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), affirmed, stating, " . . . that a mere change in a Claimant's wages could satisfy the 'change in conditions' requirement for modification." (J.A. 73).

Rambo appealed to the Ninth Circuit Court of Appeals. Only the Solicitor opposed the Appeal.

On Appeal Rambo raised three issues:

1. Must the party seeking to reopen a claim by filing a 33 *U.S.C.* Sec. 922 Modification meet a

threshold burden of showing a change in the Claimant's physical condition?

2. Should the employer in this case be estopped from filing a 33 *U.S.C.* Sec. 922 Modification because of the representation of its attorney to Rambo that the award would be paid for life?

3. Given the 1983 Award of benefits and the lack of any other evidence at the Modification trial except earnings records, should the Administrative Law Judge be directed to enter a nominal award to preserve Claimant's rights to petition for future modification?

The Ninth Circuit reversed, holding that, " . . . a party seeking to modify an award must prove that the Claimant has undergone a change in his physical condition." (J.A. 77).

The Ninth Circuit noted that " . . . (Metropolitan) relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in the Claimant's wages could satisfy the 'change in conditions', requirement of 33 *U.S.C.*, Section 922." (J.A. 77).

The Ninth Circuit stated that,

"As the *Fleetwood* dissent noted, the Fourth Circuit's Rule is in direct conflict with the Ninth Circuit's Rule. See id. at 1235 (Warriner J., dissenting) (noting that beginning with the first opinion dealing with the question, (*McCormick*) handed down in 1933, and continuing thereafter, the Courts have uniformally interpreted the term, 'change in condition' in (33 *U.S.C.* Sec. 922) to refer exclusively to a **change in physical**

> **condition** of the employee receiving compensation." (emphasis added by the Ninth Circuit).

(J.A. 78).

The Ninth Circuit also noted that, as the *Fleetwood* dissent points out, " . . . the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits." (J.A. 78).

After the decision of the Ninth Circuit, the Solicitor filed a Petition For Rehearing on behalf of Director. On the last page of that Petition the solicitor virtually conceded that Metropolitan's Application For Modification should be denied in the interest of, " . . . justice under The Act." The Solicitor noted in a footnote:

> "6. Rambo has also contended throughout that the circumstances of the parties' agreement to the 1983 award's terms included representations that the award would not be modified (at least not downwards). Modification may be denied, despite an adequate demonstration that one of the statutory conditions for it exists, where changing the award would not 'render justice under The Act.' *McCord v. Cephas*, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976). In addition, the circumstances alleged by Rambo could be construed to effect an express waiver of the employer's right to seek modification of the 1983 award under Sec. 22. Accordingly, Rambo's contention warrants full consideration." Petition For Rehearing on behalf of the Director, p. 15 (August 5, 1994)

SUMMARY OF THE ARGUMENT

This appeal arises out of a claim made by Rambo pursuant to the provisions of the *Longshore and Harbor Workers' Compensation Act* (The Act). The Act was passed by Congress in 1927 to replace the common law remedy of tort litigation between maritime workers and their employers. The purpose of The Act was to provide worker's compensation benefits to maritime workers within admiralty jurisdiction. All worker's compensation systems permit the parties to reopen claims to modify previous awards to effect substantial justice between the parties. This is a recognition of the policy that no matter how competent the original trier of fact's diagnosis of the claimant's condition and earning prospects at the time of the initial hearing, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Many jurisdictions permit, for policy reasons, virtually an unlimited reopening system. That is, either party has an unlimited period of time after the initial award to seek a modification of the prior award based on ANY change in the circumstances upon which the prior award was based.

The Act as passed by Congress and amended ten times since 1927 adopted a severely limited reopening procedure. The parties have only one year from the last payment of compensation or rejection of the claim to reopen the claim. The parties may only seek to reopen the claim for a change in conditions or a mistake in fact. In 1938 and again in 1984 Congress had before it amendments which would have liberalized and revamped the reopening process and permitted unrestricted review of claims. Both times Congress rejected this liberalization. In

1983, the Senate Report urging liberalization went so far as to point out that although the time limitation for reopening was to be eliminated, " . . . the basis on grounds for seeking modification remains as under current law." S. Rep. No. 98-81, 98th Cong., 1st Sess., p. 37 (1983).

The first case to interpret the reopening process under The Act was decided in 1933. *McCormick S.S. Co. v. United States Employees' Comm'n*, 64 F.2d 84 (9th Cir. 1933). That case held in a clear, bright line ruling that in order for the parties to reopen a claim, not only must it be timely filed, but that there must be a showing that the claimant's "physical condition" had changed since the prior award. That clear, bright line rule that the phrase "change in conditions" meant a change in the claimant's physical condition was followed in every circuit, in every case,. and was adopted by the agency charged with administering The Act. That clear, bright line rule was in force and effect when each of the ten Amendments to The Act were adopted by Congress. The clear intent of Congress, unbroken since 1927 and implemented by the Courts is to severely restrict the reopening of claims. The parties may relitigate a claim under The Act only if a Petition For Modification is filed within a limited period of time and only upon a showing of a mistake in fact or a change in the claimant's "physical condition".

In 1985 the agency charged with the Administration of The Act changed its position on reopening of claims. The Director's new position adopted the liberal approach to reopening claims and urged that claims could be relitigated for ANY change in circumstances from which a trier of fact could conclude that there had been a change

in the Claimant's earning capacity. This change in position by the Director lead to the bizarre result in *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which is a two-judge majority opinion. This case is the sole aberration in a sixty-two year line of cases that recognizes that Congress' clear intent in passing and amending The Act was to establish a conservative, severely restricted procedure for reopening cases. It cannot be better stated than by the dissenting Judge in *Fleetwood* when he proclaimed:

> "Fifty years is a long time. And perhaps it can be argued that the Board's, and the Court's, and the **CONGRESS**' erstwhile interpretation of the phrase was inhumane, or unenlightened, or an anachronism, or something else even more disparaging. But it cannot be argued, I submit, that the prior interpretation was not and is not the law."

Id. at 1236.

The Director's opinion in Rambo is not entitled to deference because:

1. The Congressional intent on the precise issue before the Court is patently clear. That intent is the law and must be enforced;

2. The Director in Rambo is appearing as a litigant with the adversarial position of protecting the Special Fund;

3. The Director's inconsistent positions on this issue without adequate explanation vitiates deference.

Therefore, based upon the clear intent of Congress to enact a severely limited reopening process, sixty-two

years of virtually unbroken precedent and the sound logic of the Ninth Circuit Court of Appeals, it is respectfully requested that this Court affirm the decision of the Court below.

ARGUMENT AND AUTHORITIES

I. NEITHER THE OPINION OF THE BENEFITS REVIEW BOARD NOR THE DIRECTOR IS ENTITLED TO DEFERENCE IN THIS CASE.

The Second Circuit addressed the issue of the deference due to interpretations of The Act by the Benefits Review Board and the Director in *Director, Office of Workers' Compensation Programs v. General Dynamics Corp.*, 900 F.2d 506 (2nd Cir. 1990).

The *General Dynamics* court noted in *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n. 18 (1980), that the Supreme Court suggested that the Benefits Review Board's views are not entitled to special deference because it performs only an adjudicatory function and is not charged with administrating The Act. *Id.* at 510. The Court then noted that the question of deference to be accorded to the Director was less clear. *Id.*

The Court found persuasive the reasoning in *Director, Office of Workers' Compensation Programs v. O'Keefe*, 545 F.2d 337, 343 (3rd Cir. 1976). The *General Dynamics* Court pointed out that, " . . . when the Director appears as a litigant in an adversarial proceeding before the Board, it

is inappropriate to grant special deference to the Director's litigating position . . . " *General Dynamics, supra,* at 510. The Court reasoned that, "If deference were accorded under such circumstances, claimants would be effectively deprived of the right to impartial review." *Id.*

The *General Dynamics* court concluded that, " . . . in light of the relationship between the roles of the Board and the Director in resolving questions of law, and the Director's adversarial position in this litigation, the Director's interpretation of The Act here is not entitled to any special deference." *Id.*

In this case Metropolitan was granted 8(f) relief. Rambo's benefits are being paid by the Special Fund. The Secretary is charged with the responsibility of administering the Special Fund and defending it. (33 *U.S.C.* Section 944). Only the Director appeared in the Ninth Circuit to oppose Rambo's appeal of the decision of the Benefit's Review Board. If the decision of the Ninth Circuit Court of Appeals is reversed, the Special Fund would benefit. Because of the clear adversarial position of the Director in this case, the Director's interpretation of the Statute should be given no special deference. (See also *Malcomb v. Island Creek Coal Company,* 15 F.3d 364 (4th Cir. 1994) holding that deference should not be afforded in a black lung case where there were different interpretations of the Board's own regulations).

Finally, an agency's construction of the statute which it administers is entitled to deference only when the intent of Congress in enacting the statute is unclear. Where Congress has clearly expressed its intent, Courts

must reject a contrary administrative construction. *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intent is the law, and must be given effect. *Western v. Luther*, 163 U.S. 331, 342 (1896).

In the case at bar the precise question before the Court is whether Congress intended to adopt a severely restrictive system for reopening previously litigated claims or adopt the "modern approach" allowing continuous monitoring of claims, forever adjusting the grievances of the parties, real or imagined.

The answer as to the intent of Congress can easily be ascertained by reviewing the legislative history of Section 22 and the cases that interpret that Section in a chronological order.

II. LEGISLATIVE HISTORY, PRECEDENT AND THE PRACTICAL ADMINISTRATION OF THE ACT MANDATE THAT THIS COURT AFFIRM THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN THIS CASE.

The original Longshoremen's and Harbor Workers' Compensation Act was enacted by Congress on March 4, 1927. The Act was to provide worker's compensation benefits to maritime workers within admiralty jurisdiction. It was the modern substitute for the old common law remedy and was recognized as necessary in the interest of social justice between employers and employees.

H.R. Rep. No. 1767, 69th Cong., 2d Sess., pp. 19-20 (1927).

Section 22 of the Original Act was as follows:

> "Sec. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."

Congressional Record-Senate, 2d Sess., March 4, 1927, S.5904.

It should be noted that Section 22 referred to the procedure contained in Section 19, which in turn referred to Section 13 which Section sets one year as the limitation period for filing claims.

The first reported case interpreting Section 22 was *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933).

In this 1933 case, the injured worker suffered a non-scheduled industrial injury on February 11, 1928. The Deputy Commissioner entered an order awarding the worker $3.96 per week permanent partial disability.

Thereafter the Deputy Commissioner modified the award and increased the worker's benefits to $8.21 per week. The Employer Appealed.

The Ninth Circuit stated that:

> "The Order complained of in this proceeding is as follows:
>
> > ' . . . It appearing to the Deputy Commissioner . . . that his physical condition has not changed since the last order, that his wages have diminished since said date because of decreased stevedore work resulting from depressed conditions." *McCormick, supra,* at 85.

The Ninth Circuit held that, "The applicant's petition for a Modification of the compensation Order was not based upon a CHANGE IN HIS PHYSICAL CONDITION but upon his decreased EARNINGS. . . . Section 22 of The Act (33 U.S.C. Sec. 922) authorizes a modification of the order due to a 'change in conditions' but we do not think this applies to a change in EARNINGS DUE TO 'ECONOMIC CONDITIONS'." *Id.* at 85. (Emphasis added).

The Order was vacated and the decision of the Deputy Commissioner reversed.

Since the *McCormick* Court announced its clear, bright line rule that the parties can reopen a claim only upon first showing a change in the claimant's condition, The Act has been amended ten times. The first Amendment to The Act was on May 26, 1934. That Amendment changed Section 922 to read as follows:

> "Sec. 22. Upon his own initiative, or upon the application of any party in interest, on the

ground of a change in conditions **or because of a mistake in a determination of fact by the deputy commissioner**, the deputy commissioners may, at any time **prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued**, review **a compensation case** in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. Such new order shall not affect any compensation **previously** paid, **except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Commission.**" H.R. Rep. No. 1244, 73d Cong., 2d Sess., p. 6 (1934).

The Report of both the House and Senate are identical. It is as follows:

"Sixth Amendment. Section 5 of H.R. 8057 (and Section 5 of S. 2794) amends section 22 of the existing act so as to broaden the grounds on which a deputy commissioner can modify an award and also while **strictly limiting** the period, extends the time within which such modification may be made . . . The amendment

> is in line with the recommendation of the Commission except that it **limits** to 1 year after the date of the last payment of compensation the time during which such modification may be made. The amendment also permits an increase or decrease in the compensation under a modifying award when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under The Act, such modifying award to date from the time of the accident." (Emphasis added).

S. Rep. No. 588, 73d Cong., 2d Sess., p. 3 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess., p. 4 (1934).

This legislative history unequivocally demonstrates that Congress intended to adopt a procedure which strictly limits the reopening process.

Clearly Congress considered whether to allow unrestricted reopenings of claims and rejected that approach. The clear, bright line rule of *McCormick* was in place and was precedent when this amendment was enacted.

The first case to address Section 922 of The Act as amended by Congress in 1934 was *Atlantic Coast Shipping Co. v. Golubiewski*, 9 F. Supp. 315 (D.Md. 1934).

In this case the court stated:

> "The single question presented is whether an injured employee who has been receiving compensation for temporary partial disability under a valid order of the Deputy Commissioner ceases to be entitled thereto by reason of his imprisonment in the penitentiary under a sentence for life consequent upon conviction for murder in the first degree." *Id.* at p. 315.

The Deputy Commissioner denied the employer's Petition to Modify pursuant to Section 922. The employer appealed and just as Metropolitan in this case, cited 33 *U.S.C.* Sec. 902 (10), which defines disability as:

> "Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

The District Court which was charged with judicial review at that time, noted that the employer's, " . . . argument is that one confined in the penitentiary is thereby precluded from earning wages and therefore it is said that the disability for the original injury is no longer the effective cause of loss of wages." *Atlantic Coast Shipping Co., supra,* at 316.

The Court answered this argument by stating:

> "However, in my opinion the exact legal question depends upon the proper construction and application of Section 22 of The Act (33 *U.S.C.* Sec. 922) which provides for modification of awards." *Atlantic Coast Shipping Co., supra,* at 316.

In answering this question the Court stated, "Looking at the context (of Section 922) in relation to the whole scope and general purposes of The Act, the most natural meaning to be given to the expression 'change in conditions' would seem obviously to refer to a change in the PHYSICAL CONDITION of the employee caused by the accident." *Atlantic Coast Shipping Co., supra,* at 317. (Emphasis added).

After an exhaustive review of domestic cases, English cases and treatises, the Court stated:

> "Considered on principle, apart from the above authorities, there would seem to be little support for plaintiffs' contention in these cases. Their argument seems necessarily to be based on the underlying assumption that the payments for temporary partial disability are a matter of grace rather than of obligation to the injured employee. This view is erroneous. The legal theory inherent in the Longshoremen's Act, as in Workmen's Compensation Acts generally, is the substitution of a certain amount of compensation (variable within limits) to the employee for his common law right of action which is taken away by the statute. While the payments for partial disability are spread over a period of time, for considerations of public policy, the obligation of the employer arises from the fact of the injury in the course of employment and accrues at the time of the injury. The subject matter has been heretofore discussed to some extent by the Circuit Court of Appeals for this Circuit in *Wheeling Corrugating Co. v. McManigal*, 41 F. (2d) [sic] 593, 595; *United States Casualty Co. v. Taylor*, 64 F.2d 521 and *Bowen v. Hockley*, 71 F.2d 781; also in the opinion of this court in *Pyrites Co. v. Davison Chemical Co.*, 4 F. Supp. 294, 297 (affirmed sub. nom. *Hockley v. Wilson* (C.C. A.) [sic] 70 F.2d 108), where it was said:
>
> 'It is a statutory substitute for the common law right of action by the employee which might culminate in a judgment for a capital sum as damages. The obligation of the employer to indemnify for the loss is in its nature a single

entity just as was the common law chose in action of the employee. That it is to be liquidated in periodic partial payments does not transmute its legal nature from an entire obligation into several separate obligations each arising from the several periodic payments required to be made, until the whole is paid.' " *Atlantic Coast Shipping Co., supra,* at 318.

The Court concluded by stating:

"Finally it may be observed that the employee's confinement in the penitentiary will not, of course, preclude the employer from further proceedings before the Deputy Commissioner for modification of the award under section 922 of 33 *U.S.C.A.* when the employee's change in physical condition, with respect to his capacity to earn wages if he were free, may justify a discontinuance of the payments for temporary partial disability or reduction in the amount thereof.

I conclude, therefore, that the orders of the Deputy Commissioner in both the cases are in accordance with the law and should not be set aside." *Atlantic Coast Shipping Co., supra,* at 318-319.

In 1935 and 1936 Congress considered amending The Act. The report of both Houses regarding the effect of the proposed amendments of Section 922 is as follows:

"Section 9, In the amendment of Section 22 of the Longshoremen's Act as contained in The Act of May 26, 1934, no provision was made for the application of the enlarged authority therein provided to cases in which the action of the deputy commissioner has been a rejection of the

> claim. In such a case, in which there has been no 'payment of compensation', the amendment failed to provide for reopening. Experience indicates that the same reasons for reopening, as provided for in this section, may exist where the claim has been rejected as in the case where compensation has been paid either with or without an award. The purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases finally acted upon by the deputy commissioner."

S. Rep. No. 1199, 74th Cong., 1st Sess., p. 4 (1935); H.R. Rep. No. 2237, 74th Cong., 2d Sess., p. 5 (1936).

While this Amendment was being considered by Congress, the Ninth Circuit decided *Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, (9th Cir. 1936), rev'd on other grounds, 301 U.S. 174 (1937). In that decision, referring to Sec. 922, the Ninth Circuit noted that, "The expression 'change in conditions' refers to a change in the physical condition of the employee." *Pillsbury, supra* at 960 citing, *Atlantic Coast Shipping Co. v. Golubiewski*, 9 F. Supp. 315, 317 (D.C. Md. 1934).

In 1938 Congress amended Section 922 and its reports were identical to the paragraph attached to its proposed amendment in 1935 and 1936 set forth above. S. Rep. No. 1988, 75th Cong., 3d Sess., p. 13 (1938).

Again Congress clearly considered the issue of allowing unrestricted reopening of claims. It rejected unrestricted reopenings and limited to one year the time limit to reopen after the initial claim was rejected. The clear, bright line rule of *McCormick* had been in place for five

years and had been judicially approved in two subsequent court rulings.

On April 11, 1944 the 5th Circuit decided *Burley v. Welding Works, Inc., v. Lawson*, 141 F.2d 964 (5th Cir. 1944). In that case the injured employee suffered a non-scheduled injury on November 23, 1940. The Deputy Commissioner entered an Order on July 29, 1942 awarding the Claimant permanent partial disability benefits at the rate of $8.00 per week. On August 5, 1942 the employer filed a Section 922 Modification supported by the injured worker's increased earnings records. Modification was denied. The employer appealed.

The 5th Circuit stated:

> "It has been uniformly held that the term 'change in conditions' in Section 22 of The Act, which authorizes the modification of a previous award, means a change in the employee's physical condition, and not other conditions." *Burley Welding Works, Inc., supra*, at 966, citing *McCormick, supra*, and *Pillsbury, supra*.

The Order of the Deputy Commissioner was affirmed and the Petition For the Modification dismissed.

On October 9, 1974 the Benefits Review Board decided *Rizzi v. The Four Boro Contractor Corp.*, 1 BRB 130 (1970).

In this case the injured worker in 1966 was awarded a non-scheduled award for permanent partial disability. In 1971 he filed a Section 922 Petition For Modification alleging permanent total disability. At trial the Administrative Law Judge denied the Modification finding that

the Claimant's total disability was unrelated to his industrial injury.

The Benefits Review Board stated:

> "The Act provides that a compensation order may be reviewed on grounds of change in conditions or because of mistake in a determination of fact by the deputy commissioner. 33 *U.S.C.* Sec. 922. The term, 'change in condition', means alteration of the physical condition of the employee caused by the accident. *Bay Ridge Operating Co. v. Lowe,* 14 F. Supp. 280 (S.D. N.Y. 1936). Further, to qualify for additional benefits, such change in condition must have occurred between the time of the award which is being modified and the time of application for modification. *Jarka Corp. v. Hughes,* 299 F.2d 534 (2nd Cir. 1962)."

Rizzi, supra at p. 131.

The Board affirmed the order of the Administrative Law Judge and the Modification was denied. It should be noted that in this case the agency charged with the administration of The Act took the opposite position to the present interpretation of "change in conditions" now taken by the Director in the instant case.

On May 14, 1981, Senate Bill 1182 amending The Act was introduced. It was identical with H.R. 25 also proposed in the 97th Congress. The Senate passed Senate Bill 1182 on July 27, 1982. When received by the House of Representatives, the bill was referred to the Committee on Education and Labor. The 97th Congress adjourned

without enacting any amendments to The Act. Congressional Record – Senate, 98th Cong., 1st Sess., January 26, 1983, S.576.

On January 26, 1983 Senate Bill 38 was introduced in the Senate and was virtually identical with Senate Bill 1182. Congressional Record – Senate, 98th Cong., 1st Sess., January 26, 1983, S.570. On June 16, 1983, Senate Bill 38 again passed the Senate. H.R. Rep. No. 98-570, 98th Cong., 1st Sess. pp. 1-2 (1983).

With regard to Section 22 of The Act the Senate Report of May 9, 1983 stated at p. 37:

"MODIFICATIONS

> Consistent with the change made in section 8(h) on the issue of wage earning capacity, the one year time limit for modification of awards has been **eliminated**. Although the time limit has been changed, **the basis or grounds for seeking a modification remains as under current law**. It is the committee's intent that this amendment also will preclude any future proceeding for modification of a settled case in accordance with section 22. This amendment promotes equity by permitting **all parties to apply for modification of awards at any time after an award is entered**. The one year limitation was unreasonably short in light of the long term effects of the major industrial injuries sustained by workers covered by The Act. As a consequence, administrative law judges felt compelled to award benefits for wage loss at the rate of 1 percent in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified. The new approach is far more realistic,

> allowing claimants, for example, to apply for increased benefits for wage loss or for greater physical disability at a time when the full effects of an injury may manifest themselves. **Requests for modification will no longer be necessary simply to keep the statute of limitations from running.**" (Emphasis added). S. Rep. No. 98-81, 98th Cong., 1st Sess. pp. 37-38 (1983).

At p. 36 of the same Senate Report, Section 8(h) was discussed as follows:

> "WAGE EARNING CAPACITY
>
> Section 8(h) was amended by deleting the phrase 'as it may naturally extend into the future.' The remainder of the section is unchanged. The deletion is intended to reduce speculation on the part of fact finders as to the extent of future loss of wage earning capacity. The result will be a realistic assessment of the claimant's current loss of wage earning capacity along with a concomitant predictability which will lead to ease of insurability."

Specifically the proposed amendment to Section 22 was:

> "MODIFICATION OF AWARDS
>
> SEC. 14. Section 22 is amended by striking all after 'the deputy commissioner may' through 'rejection of claim'." S. Rep. No. 98-81, *supra* p. 11.

In the House of Representatives Report of November 18, 1993 in its Section by Section analysis of Section 22 it is stated:

> "Section 14 amends section 22 of The Act to permit the modification of an award or review

of a compensation claim **at any time** on the grounds of changed circumstances or mistakes. (Emphasis added). H.R. Rep. No. 98-570, 98th Cong., 1st Sess., p. 29 (1983).

After different versions of the Amendments passed both houses of Congress, the bills were referred to Conference Committee.

In the Conference Report of September 14, 1984, the Amendment of Section 8(h) was withdrawn. Conference Report on S. 38, Congressional Record – House, September 14, 1984, H.25495.

Section 22 was amended as follows:

"MODIFICATION OF AWARDS

SEC 16. Section 22 is amended –

(1) by inserting "(including an employer or carrier which has been granted relief under section 8(f))" after "party in interest";

(2) by inserting "(including a case under which payments are made pursuant to section 44(i))" after "review a compensation case"; and

(3) by adding at the end thereof the following new sentence: "This section does not authorize the modification of settlements". *Id.* at p. 25497.

In the Joint Explanatory Statement of the Committee of Conference it is stated:

"SPECIAL FUND

Conference substitute . . .

By permitting an employer or carrier to remain a party in a special fund case, **the conferees do not intend to expand or contract the rights of**

> **an employer or carrier beyond those prevailing in a non-special fund case**. (Emphasis added). *Id.* at S.25502.

On September 20, 1984 the report of the Committee of Conference was placed before the Senate. Conference Report on S.38, Congressional Record – Senate, September 20, 1984, S.26296.

Mr. Hatch noted that, " . . . this measure is the product of literally a decade of intense debate, close scrutiny, and hard negotiation . . . Senate Bill 38 reflects a fragile consensus carefully crafted over the last several years." *Id.* at S.26297.

As enacted the 1984 Amendments rejected the original version of both the Senate and House bill which permitted unlimited reopening of claims by the parties to adjust or terminate benefits previously awarded. Congress clearly and specifically chose to retain the then 51 year system that permitted reopening of claims only based upon a change in the Claimant's physical condition and then only within the one year period. Congress expressly rejected the original amendments that contained the philosophy of a never ending open period for reopening claims. Congress clearly expressed its will to retain a restrictive system, limiting the reopening of claims after a prior award had become final. The clear, bright line rule of *McCormick* and its progeny was 51 years old when the amendments became law and the Congressional scheme adopted in 1984 retained the then existing system of severely restricting the reopening of claims.

While Congress was in the middle of amending The Act, on March 19, 1982 the First Circuit decided *General Dynamics v. Director, Office of Workers' Compensation Programs*, 673 F.2d 23 (1st Cir. 1982).

In this case the employer sought to reopen Under Section 922 in order to raise the defense of 8(f) relief. The Court stated, "Since there was no change in claimant's physical condition, (Footnote 6), in order to reopen the case the employer must show that there was a mistake in the determination of a fact". *Id.* at 25.

> "Footnote 6. Courts uniformally have held that a 'change in conditions' means a change in the employee's 'physical condition', not other conditions. E.g. *Burley Welding Works, Inc., v. Lawson*, 141 F.2d 964 (5th Cir. 1944)." *Id.* at 25.

It is of interest that the Court noted:

> "We are not insensitive to the employer's claim that reopening here might be said to be in the interest of justice. Nevertheless, we hold that such a reopening would not serve the orderly administration of justice which depends in no small part upon finality of judicial determinations." *Id.* at 26.

Verderane v. Jacksonville Shipyards, Inc., 772 F.2d 775 (11th Cir. 1985) was decided on September 30, 1985 by the 11th Circuit. In this case the Administrative Law Judge found the Claimant permanently and totally disabled. The employer appealed and the Benefits Review Board agreed the Claimant was permanently and totally disabled but remanded on the issue of coverage under The Act. At the Deputy Commissioner level the employer attempted to raise 8(f) relief. The Administrative Law

Judge denied 8(f) relief for failure to timely raise this defense and found that the Claimant was covered under The Act. While this case was pending a United States Supreme Court decision intervened on coverage and the Board ruled that the injured worker was covered under The Act. The Board reinstated the original permanent and total award. The employer appealed on the issue of 8(f). The employer argued that it could reopen under Section 922 and raise 8(f) for:

1. change of conditions, or,

2. mistake in determination of fact. (Presumably the change of conditions was the intervening decision of the U.S. Supreme Court).

The 11th Circuit noted:

> "A 'change in conditions', for purposes of Section 22 refers to a change in an employee's physical condition." Citing *General Dynamics, supra.*

The Court concluded that, "Because the Claimant's physical condition has not been shown to have changed during the time he received the awards, the inquiry advances to the second issue: whether there was a mistake in the determination of a fact." The Court concluded there had been none and affirmed the Board's ruling.

This review of legislative history and case precedent provides a framework with which to examine the authority relied upon by Petitioner.

Rambo agrees that Professor Larson's work is instructive on the issue of reopening of compensation

claims. This work does address the competing philosophies concerning the reopening of previously litigated claims. (See 3 *Larson, The Law of Workmens' Compensation*, Sec. 81.00 *et seq.* (1994)). However, it is respectfully submitted that the author's entire analysis, not merely portions, should be considered. The relevant sections of *Larson* are:

"Sec. 81. REOPENING AWARDS

Sec. 81.00 At the administrative level, awards can be reopened by the compensation board for modification to meet changes in claimant's condition, such as increase, decrease or termination of disability. For reasons of administrative practicality, time limits within which such petitions may be brought are usually imposed. On a reopening for changed condition, no other issues may be relitigated, and the claimant's evidence must bear directly upon the comparison between his former and his present disability. A few jurisdictions afford their commissions broad power to reopen cases in the interest of justice or for any good reason. *Larson, supra,* p. 15-956.

Sec. 81.10 Summary of reopening problems

In all states, some kind of provision is made for reopening and modifying awards. This provision is a recognition of the obvious fact that, no matter how competent a commission's diagnosis of claimant's condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments during a specified maximum period

or during disability, the objectives of the legislation are best accomplished if the commission can increase, decrease, revive, or terminate payments to correspond to claimant's changed conditions. **Theoretically**, then, commissions ought to exercise **perpetual** and **unlimited** jurisdiction to **reopen cases** as often as necessary to make benefits meet current conditions. But the **administrative and practical** difficulties of such a course have led to **severe limitations** on the power to reopen and alter awards. The most serious administrative problem lies in the necessity of preserving the full case records of all claimants that have ever received any kind of award, against the possibility of a future reopening. Moreover, any attempt to reopen a case based on an injury ten or fifteen years old must necessarily encounter awkward problems of proof, because of the long delay and the difficulty of determining the relationship between some ancient injury and a present aggravated disability. Another argument is **that insurance carriers** would never know what kind of future liabilities they might incur, and would have difficulty in computing **appropriate reserves**." *Id.* at pp. 15-956-15-957.

With respect to reopening an award for change in condition, *Larson* states:

"Sec. 81.30 Reopening for change in condition.

Sec. 81.31 What constitutes change in condition.

Sec. 81.31(a) Basic rule: change in physical condition required.

The 'change in condition' which justifies reopening and modification is ordinarily a

> change, for better or worse, in claimant's physical condition." (Citing 17 pages of footnotes) *Id.* at pp. 15-988-15-1016.

The author's exhaustive review of virtually every state's reopening system emphasizes that there are essentially two competing concepts regarding reopening of claims. Both concepts are grounded on conflicting policy considerations. On the one hand some jurisdictions permit unlimited reopening of claims for an unlimited period of time based upon virtually any change in circumstances. On the other hand some jurisdictions severely limit reopening of claims to a short period of time and only if there has been a change in the employee's physical condition since the prior award.

The Petitioner also relies upon *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985) which was decided November 5, 1985 by the 4th Circuit Court of Appeals after the 1984 Amendments were enacted.

The decision is a two-Judge majority opinion with a vigorous dissent. In its opening paragraph the majority notes that Claimant received an award for a back injury that occurred on July 11, 1975 and an award was made pursuant to The Act and as, " . . . amended at 33 U.S.C. Sec. 901-950 in *1982*." (*Sic*).

The Court stated, " . . . about two years . . . ", after the award, " . . . the employer applied for a modification of the compensation order, arguing that a 'change in conditions' had occurred in that *Fleetwood* had acquired new job skills and was working as a production coordinator. *See* 33 *U.S.C.* Sec. 922 ('employer or employee may

obtain modification of award based upon a change in conditions')." *Id.* at p. 1227.

The majority stated that, "*Fleetwood* argued that his original award could not be modified because under Section 22 of the statute the term 'change of conditions' included only a change in the worker's physical condition and the fact that a worker was earning higher wages in his new job than in his pre-injury job was irrelevant as long as there was no improvement in the condition of his back" *Id.* at p. 1227.

The majority opinion held that a change in an employee's wage earning capacity could be the basis for a Sec. 22 Modification without a change in the employee's physical condition, " . . . because (this) is consistent with the statute's purpose and is a reasonable view of the statutory language." *Id.* at p. 1228.

The majority in rejecting the clear bright line rule of *McCormick* comments:

> "We reject this reading of the statute because it is not in keeping with the purpose of The Act, which is to compensate workers for injuries that affect their wage-earning capabilities." *Id.* at p. 1229.

This does not advance the ball!

The issue is not whether to compensate for injures but rather the issue is what has Congress said about permitting parties to reopen claims and relitigate finished business. Congress clearly in the 1938 and 1984 Amendments rejected unrestricted reopening of claims. Congress had before it this very issue in 1981, 1983 and 1984. Congress chose not to allow the Department of Labor and

the Office of the Administrative Law Judges to build their empire by scrutinizing each claim ad infinitum. Congress retained a severely restricted system of reopening claims. The *Fleetwood* majority by rejecting the clear, bright line rule of *McCormick* attempts by judicial decision to enact the philosophy for reopening of claims clearly rejected by Congress.

The majority's tortured attempt to distinguish fifty-two years of case precedent and its citation of cases that do not involve the reopening procedure is ingenuous at best.

In a further anachronism, the *Fleetwood* majority stated that, " . . . the statute itself provides that at an initial determination hearing, at a modification hearing as well, any factors which may affect the future earnings of the Claimant are to be taken into consideration." *Id.* at p. 28.

It is respectfully submitted that at the initial hearing the beginning and end all inquiry is, has the industrial worker suffered a physical injury that was caused by his employment? If the answer is NO, that ends all inquiries. If the answer is YES, in a non-scheduled case, the *Fleetwood* majority is correct and the factors they cite are addressed to determine if there has been a loss of wage earning capacity.

In spite of its statement to the contrary, the *Fleetwood* majority uses two different methods in considering claims at the initial hearing and at the reopening hearing. In fact they invert the process at the reopening hearing and permit modification without regard to a consideration of the claimant's physical condition.

Under the *McCormick* approach which implements the Congressionally approved system, at the reopening hearing the focus is initially directed at the employees physical condition. If there has been no change in the claimant's physical condition, reopening is denied; just as at the initial hearing if there was no physical injury, the claim is dismissed. Only if there has been a change in the Claimant's physical condition under the *McCormick*-Congressional scheme does the reopening hearing proceed to a consideration of loss of wage earning capacity. Thus the *McCormick*-Congressional approach makes parallel inquiries at both the initial hearing and the reopening hearing.

The *Fleetwood* majority in tacit recognition that it was adopting a liberal reopening policy in contradiction of the Congressional approach comments that, "We cannot solve the problem of the short statute of limitations by completely excluding modifications on the basis of a change in wage-earning capacity."

This is precisely what Congress did! Congress chose to retain the Statute of limitations AND the fifty-one year old clear, bright line rule that severely LIMITS the ability of the PARTIES to reopen cases.

One can therefore only feel empathy for Judge Warriner's frustration when he states in his dissent:

> "Fifty years is a long time. And perhaps it can be argued that the Board's, and the Courts', and the Congress' erstwhile interpretation of the phrase was inhumane, or unenlightened, or an anachronism, or something else even more disparaging. But it cannot be argued, I submit, that

> the prior interpretation was not and is not the law." *Id.* at 1236.

In summary the clear intent of Congress was to adopt a severely limited reopening procedure and this intent has been followed in all cases except the *Fleetwood* majority. It is respectfully submitted that the *Fleetwood* majority opinion is an aberration that should not be followed. Likewise, in the face of the clear intent of Congress to severely limit reopening of claims the opinion of the Director should not be afforded deference. *Western v. Luther, supra.*

III. OTHER ISSUES RAISED BY RAMBO ON APPEAL AND ON WRIT OF CERTIORARI

Rambo raised three issues on Appeal to the Ninth Circuit. The defining legal issue before the Ninth Circuit as well as this Court is of course the question of under what circumstances can a claim be reopened under 33 *U.S.C.* Section 922. The other two issues raised by Rambo that became moot by the Ninth Circuit's decision were:

> 1. Should the employer be estopped from filing a 33 *U.S.C.* Sec. 922 Petition For Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?
>
> 2. Given the 1983 Stipulated Decision and Order Awarding Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

Should this Court decide that the prerequisites to reopen a claim were satisfied in this case, a determination of Rambo's alternative grounds for appeal should be addressed. It is respectfully requested in this event that this Court remand this case to the Ninth Circuit Court of Appeals for resolution of the remaining issues in this case.

CONCLUSION

The Director's change in position to one advocating a liberal reopening process is of course explicable. This modern liberal approach will without doubt lead to more people being employed by the Department of Labor to forever monitor claims. What is inexplicable is that the insurance industry and the employers groups support a liberalization of the Congressional scheme. The *Fleetwood* majority decision opens the door to virtually unrestricted reopening of prior awards. It is wondered if the insurance industry and the employer groups will be willing to accept the modern, liberal *Fleetwood* approach when future petitions to reopen are based simply on a showing of decreased earnings.

Finally, it should be emphasized that when the parties in this case **stipulated** to Rambo's original award, the clear, bright line rule of *McCormick* was fifty years old. *Fleetwood* was two years in the future. Clearly, when the parties made their agreement, their expectations were that the arrangement would **only** be modified if there were a change in Rambo's **physical condition**. Based on this expectation, coupled with the fact that Congress

clearly intended to adopt a restricted reopening process and the fact that the Courts have implemented this intent for sixty-two years, this Court should affirm the Ninth Circuit's judgment herein.

Therefore, for the aforesaid reasons, the Court should affirm the Ninth Circuit's judgment herein.

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No. 94-820

In the Supreme Court of the United States

OCTOBER TERM, 1994

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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TABLE OF AUTHORITIES

Cases:	Page
Ardestani v. *INS*, 502 U.S. 129 (1991)	3
Banks v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968)	4, 5
Brown v. *Gardner*, 115 S. Ct. 552 (1994)	4
Central Bank v. *First Interstate Bank*, 114 S. Ct. 1439 (1994)	4
Chapman v. *United States*, 500 U.S. 453 (1991)	3
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	7
Connecticut Nat'l Bank v. *Germain*, 112 S. Ct. 1146 (1992)	3
Director, OWCP v. *General Dynamics Corp. (Bergeron)*, 982 F.2d 790 (2d Cir. 1992)	7
Director, OWCP v. *General Dynamics Corp. (Krotsis)*, 900 F.2d 506 (2d Cir. 1990)	7
Director, OWCP v. *Newport News Shipbuilding & Dry Dock Co.*, No. 93-1783 (Mar. 21, 1995)	7, 9, 10
Estate of Cowart v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992)	2, 7, 9
Fleetwood v. *Newport News Shipbuilding & Dry Dock Co.*:	
16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985)	9
776 F.2d 1225 (4th Cir. 1985)	4, 10
Intercounty Constr. Corp. v. *Walter*, 422 U.S. 1 (1975)	5
Martin v. *OSHRC*, 499 U.S. 144 (1991)	7, 8
McCormick S.S. Co. v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933)	3
Pierce v. *Underwood*, 487 U.S. 552 (1988)	4, 6
United States v. *Alaska*, 112 S. Ct. 1606 (1992)	8
United States v. *Gaubert*, 499 U.S. 315 (1991)	8

Statutes: Page

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:
§ 2(10), 33 U.S.C. 902(10) 2, 10
§ 8(a), 33 U.S.C. 908(a) 10
§ 8(c)(21), 33 U.S.C. 908(c)(21) 2, 5, 10
§ 8(e), 33 U.S.C. 908(e) 5
§ 8(j), 33 U.S.C. 908(j) 5
§ 21(c), 33 U.S.C. 921(c) 10
§ 22, 33 U.S.C. 922 ..... 1, 2, 3, 4, 5, 6, 7
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* 7

Miscellaneous:

130 Cong. Rec. 25,502 (1984) 6
H.R. Rep. No. 1244, 73d Cong., 2d Sess. (1934) 4
H.R. Rep. No. 1945, 75th Cong., 3d Sess. (1938) 5
S. Rep. No. 588, 73d Cong., 2d Sess. (1934) 4
S. Rep. No. 1988, 75th Cong., 3d Sess. (1938) 5
S. Rep. No. 81, 98th Cong., 1st Sess. (1983) 6

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-820

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA) allows modification of a benefits award "on the ground of a change in conditions." 33 U.S.C. 922. As we explain in our opening brief, the term "change in conditions" is most naturally read—by itself, in light of this Court's decisions construing Section 22, and in context with other provisions of the LHWCA—to include a change in any of the conditions that affect the claimant's entitlement to an LHWCA benefits award. Gov't Br. 9-12. Respondent Rambo disagrees, arguing, based on his reconstruction of the

LHWCA's legislative history, that the term "change in conditions" refers only to a change in the claimant's "physical condition." Resp. Br. 12-28. He additionally contends that the Director's interpretation of the LHWCA is entitled to no deference, *id.* at 10-11, and that the Director's approach would lead to unrestricted reopening of claims and other anomalies, *id.* at 29-35, 36-37. Rambo is mistaken as to each of those contentions.

1. When a court construes a statute, its starting point is the statutory language. When that language speaks clearly to the issue in question, the court's inquiry, "in all but the most extraordinary circumstance, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). Section 22 of the LHWCA provides for modification of a disability award "on the ground of a change in conditions." 33 U.S.C. 922. The plural term "conditions" does not restrict modification to a change in the employee's "physical condition." By its plain terms, it allows modification based on a change in any of those conditions that determine the claimant's statutory entitlement to benefits.

As we explain in our opening brief, the LHWCA provides disability benefits on account of an injury-caused loss of wage-earning capacity. See 33 U.S.C. 902(10) (defining disability); 33 U.S.C. 908(c)(21) (setting out compensation for non-schedule injuries). A change in conditions that increases an injured employee's wage-earning capacity, whether it results from physical recuperation or from acquisition of new job skills, is a relevant "change in conditions" for purposes of Section 22. See Gov't Br. 14-15. Construing Section 22 according to its plain terms is fair to employers and employees; it

gives meaning to the LHWCA's reporting requirements; it furthers the statutory goal of rehabilitating disabled workers; and it avoids the perverse incentives and costs of the court of appeals' approach, which would allow modification based only on a change in the claimant's physical condition. See Gov't Br. 15-19.

Rambo argues for a contrary result based on his construction of the legislative history of the 1934, 1938, and 1984 amendments of Section 22 of the LHWCA, none of which altered the phrase "change in conditions" in that Section. See Resp. Br. 12-35. Rambo essentially asks the Court to ignore express statutory language in favor of dubious inferences from legislative reports that do not squarely address either the relevant statutory language or the legal issue presented in this case. This Court has rejected similar arguments on past occasions, explaining that when the language of a statute is clear, there is no need to examine legislative history. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Ardestani* v. *INS*, 502 U.S. 129, 136 (1991). And as the Court has observed, post-enactment legislative history particularly is "an unreliable guide to legislative intent." *Chapman* v. *United States*, 500 U.S. 453, 464 n.4 (1991). Rambo's argument demonstrates the accuracy of that observation.

Rambo contends that Congress's amendment of Section 22 without comment on the meaning of the term "change in conditions" amounts to implicit approval of a "clear, bright line ruling"—supposedly adopted in *McCormick S.S. Co.* v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), and other lower court decisions—that the parties can reopen a disability award only upon "a showing that

the claimant's 'physical condition' had changed since the prior award." Resp. Br. 8. As we explain in our opening brief, *McCormick* did not adopt Rambo's "bright line rule." Gov't Br. 20-21. See *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1231 (4th Cir. 1985). The other decisions that Rambo cites contain, at most, errant or obiter dicta on the subject. See Gov't Br. 21-24. Thus, Rambo cannot demonstrate that Congress has "re-enact[ed] statutory language that has been given a consistent judicial construction." *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1452 (1994); *Pierce* v. *Underwood*, 487 U.S. 552, 566-567 (1988). Indeed, Rambo is unable to show that Congress knew or approved of that dicta. See *Brown* v. *Gardner*, 115 S. Ct. 552, 556-557 (1994).

Congress's 1934 amendments of Section 22 are silent on the meaning of the term "change in conditions." The 1934 amendments extended the time for reopening an award (from any time during the term of the award until one year after the last payment of compensation) and broadened the grounds for reopening to include a "mistake in a determination of fact" in addition to a "change in conditions." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 463-464 (1968) (quoting S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934)). But the amendments left the phrase "change in conditions" untouched, and the legislative reports did not discuss that phrase or any case law construing it. The legislative history provides no reason to think that Congress understood that phrase to depart from its ordinary meaning, which is not limited to a change in the employee's physical condition. See *Banks*, 390 U.S. at 465 (construing Section 22's term "determination of

fact" based on its "ordinary meaning"); see also *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 8-11 (1975).

Congress's 1938 amendment of Section 22 also provides no support for Rambo's position. Congress broadened Section 22 to allow modification not only within one year from the last payment of compensation, but also within one year from the denial of an award. See *Intercounty Constr.*, 422 U.S. at 11; *Banks*, 390 U.S. at 464-465. But nothing in that amendment or its legislative history indicates that Congress intended to restrict the ordinary meaning of "change in conditions." See Gov't Br. 26 & n.19. Rather, the reports accompanying those amendments suggest that Congress understood that modification was generally available based on a change in wage-earning capacity. See S. Rep. No. 1988, 75th Cong., 3d Sess. 6 (1938) (awards for partial loss of wage-earning capacity under Section 8(c)(21) and (e) of the LHWCA, 33 U.S.C. 908(c)(21) and (e), are "subject to readjustment from time to time over long periods"); H.R. Rep. No. 1945, 75th Cong., 3d Sess. 6 (1938) (same).

Congress's 1984 amendment of Section 22 is also unhelpful to Rambo's position. As we discuss in our opening brief (Gov't Br. 27), Congress amended Section 22 to give employers, such as petitioner in this case, the opportunity to seek modification of awards that are paid primarily by the Special Fund that the Director administers. Congress enacted that amendment in conjunction with the addition of Section 8(j) to the LHWCA, which allows employers to require disabled employees to submit reports of their earnings. 33 U.S.C. 908(j). As we explain in our opening brief, Congress's enactment of Section 8(j)'s reporting requirements reflects an understanding that

an employer could seek modification of a past award upon a showing of a change in the employee's wage-earning capacity, whether or not the employee's physical condition had changed. See Gov't Br. 16-17, 27.

Rambo cites congressional committee and conference statements respecting the 1984 amendments, which indicate that "the basis or grounds for seeking a modification remains as under current law," Resp. Br. 23-24 (quoting S. Rep. No. 81, 98th Cong., 1st Sess. 37-38 (1983)), and that "the conferees do not intend to expand or contract the rights of an employer or carrier beyond those prevailing in a non-special fund case," Resp. Br. 25-26 (quoting 130 Cong. Rec. 25,502 (1984)). Those statements do not support Rambo's position. As they implicitly acknowledge, "it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *Pierce*, 487 U.S. at 566. And as we have explained, the courts have never definitively accepted Rambo's version of the "current law." See Gov't Br. 20-24. Rambo is likewise mistaken in suggesting that Congress implicitly supported his restrictive interpretation of the term "change in conditions" by rejecting a proposed amendment that would have allowed modification "at any time." Resp. Br. 22-27. That failed amendment says nothing about which "conditions" bear on the question of modification within Section 22's existing time period. See generally Pet. Br. 21-34.

2. Rambo argues that the Court should not give deference to the Director's construction of Section 22. Resp. Br. 10-12. The question whether the Director's interpretation is entitled to deference would arise, however, only if this Court concludes that Sec-

tion 22's language is ambiguous. See, *e.g.*, *Estate of Cowart*, 112 S. Ct. at 2594-2595. In that circumstance, the Director's interpretation should receive the deference that is normally accorded to an agency official's reasonable construction of a statute that the official is charged with administering. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

As the Court recently noted, the Director's authority to administer the LHWCA includes "the power to resolve legal ambiguities in the statute." *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 93-1783 (Mar. 21, 1995), slip op. 13. Rambo contends that the Director's interpretation of an ambiguous statutory provision is not entitled to deference where the Director "appears as a litigant in an adversarial proceeding." Resp. Br. 10-11 (quoting *Director, OWCP* v. *General Dynamics Corp.* (*Krotsis*), 900 F.2d 506, 510 (2d Cir. 1990)). Rambo's reliance on *Krotsis*, however, is misplaced. The Second Circuit has overruled that decision, correctly recognizing that this Court "squarely rejected" its reasoning in *Martin* v. *OSHRC*, 499 U.S. 144 (1991). *Director, OWCP* v. *General Dynamics Corp.* (*Bergerson*), 982 F.2d 790, 795 (1992).

This Court ruled in *Martin* that the Secretary of Labor's construction of a safety standard under the Occupational Safety and Health Act was entitled to deference, even though it was advanced through an enforcement action before the Occupational Safety and Health Review Commission, because the Secretary's interpretation of her regulation in the administrative adjudication "*is* agency action, not a *post hoc* rationalization of it." 499 U.S. at 157. The

Court explained that "the Secretary's litigation position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." *Ibid.*

As the Court's decision in *Martin* indicates, the Director's interpretation of an ambiguous provision of the LHWCA is entitled to deference, regardless of whether she has announced her interpretation through rulemaking or in the course of an administrative adjudication, because it reflects the responsible agency official's determination of a matter that Congress has left to the official's charge. The Director necessarily construes ambiguous terms of the LHWCA in the course of administering the benefits program. Like other agency officials, the Director has discretion in choosing how best to administer the statute, and she can announce official interpretations through rulemaking, participation in an administrative adjudication, or other more informal means. See *United States* v. *Alaska*, 112 S. Ct. 1606, 1619 (1992); *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991); *Martin*, 499 U.S. at 157. Those interpretations are entitled to a measure of deference regardless of the form that they take. *Ibid.* The issue of deference in this case, however, can be set to one side. The Director's interpretation should prevail because it is the most reasonable construction of the statute. See Gov't Br. 25-30.

3. Rambo also asserts (Resp. Br. 29-31) that the Director's construction of the term "change in conditions" would allow virtually unlimited reopening of cases and create administrative problems for the De-

partment and uncertainty for insurance carriers. That policy issue, however, is for Congress rather than the courts. Congress has elected to allow a reopening of benefit awards based upon a "change in conditions." That choice does indeed permit more reopenings than if Congress had allowed modification of awards only upon a change in the claimant's "physical condition." But Congress was entitled to strike that balance in formulating "a scheme for fair and efficient resolution of a class of private disputes." *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, slip op. 10. See *Estate of Cowart*, 112 S. Ct. at 2598.

In any event, Rambo's concerns are overstated. As we explain in our opening brief (Gov't Br. 28-30), the Director's construction does not lead to unlimited reopening. Indeed, eleven years of experience since the Board's decision in *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985), confirms that the Director's construction is workable. Rambo's construction presents the more serious problems of administration, because it creates perverse incentives for employers to delay claims adjudication and for employees to delay rehabilitation. Gov't Br. 19; see also Pet. Br. 12; Brief of Indus. Indem. Ins. Co. as Amicus Curiae in Support of Pet'r 15.

Rambo also argues (Resp. Br. 33-35) that reopening benefits awards on a ground other than a change in the claimant's physical condition would result in the use of one method for evaluating claims in the initial hearing and a different method in the modification proceeding. That assertion, however, is

incorrect. In both cases, a claimant is entitled to a non-schedule award of benefits only if the claimant has suffered a physical injury that has caused a loss of wage-earning capacity. See Gov't Br. 12-16. In both cases, an employer can defeat an award by establishing *either* an absence of injury *or* no loss of wage-earning capacity. See 33 U.S.C. 908(a) and (c)(21) (benefits awarded for disability); 33 U.S.C. 902(10) ("disability" defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury"); Gov't Br. 28. Thus, the same method is used for a modification as for an initial decision. See *Fleetwood*, 776 F.2d at 1232.*

* * * * *

* This Court recently ruled that the Director cannot seek court of appeals review of Benefits Review Board decisions unless she satisfies Section 21(c) of the LHWCA, 33 U.S.C. 921(c), which allows appeals by those who are "adversely affected or aggrieved" by the Board's decision. See *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co., supra*. The question of the Director's standing to appeal is not directly before the Court here, because the Director participated as a respondent supporting the Benefits Review Board's decision in the court of appeals, the Court has not granted the Director's petition for a writ of certiorari, and the Director is participating as a respondent supporting the private petitioner in this proceeding. See slip op. 5 n.2. The Court has expressly reserved the question whether the Director can establish standing to appeal based on a decision's impact on the LHWCA Special Fund. See *id.* at 3 n.1, 6 n.3.

For the reasons stated in our opening brief and herein, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER TERM, 1994

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
v.
JOHN RAMBO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SHIPBUILDERS COUNCIL OF AMERICA, THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE UNDERLYING WAGE-EARNING CAPACITY PREMISE AND PLAIN LANGUAGE OF THE LHWCA ALLOW § 22 MODIFICATION FOR A SUBSEQUENT INCREASE IN A CLAIMANT'S WAGE-EARNING CAPACITY	5
A. The LHWCA Statutory Scheme For Calculating Disability Benefits Is Based On 'Wage-Earning Capacity'	5
B. The Plain Language And Purpose Of § 22 Allow Modification For A Subsequent Change In A Claimant's Wage-Earning Capacity	9
C. The 1984 Amendments Reaffirm Congressional Intent To Permit Modification Upon A Subsequent Change In Wage-Earning Capacity	12
D. The Pre 1984 Legislative History Of § 22 Does Not Support The Ninth Circuit's Narrow Reading	15
II. THE NINTH CIRCUIT'S DECISION UNDERMINES FEDERAL PUBLIC POLICY MANDATES CONCERNING THE HIRING OF HANDICAPPED WORKERS	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: Page

American Mutual Insurance Co. of Boston v. Willie B. Jones, 426 F.2d 1263 (D.C. Cir. 1970) 7

Bath Iron Workers Corp. v. Director, OWCP, 113 S.Ct. 692 (1993) 6, 7

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1983) 11

Cowart v. Nicklos Drilling Co., 505 U.S. ——, 112 S.Ct. 2589 (1992) 11

Demarest v. Manspeaker, 498 U.S. ——, 111 S.Ct. 599 (1991) 11

Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225 (4th Cir. 1985) 3, 11

John W. McGrath Corp. v. Hughes, 289 F.2d 403 (2d Cir. 1961) 7

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 5

McCormick S.S. Co. v. United States Employees' Compensation Committee, 64 F.2d 84 (9th Cir. 1933) 3, 16

Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249 (1977) 5

Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980) 5, 7

Rambo v. Director, Office of Workers' Compensation Programs, 28 F.3d 86 (9th Cir. 1994) 10

See v. Washington Metropolitan Area Transit Authority, 36 F.3d 375 (4th Cir. 1994) 6

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 5

Statutes, Regulations and Rules:

Americans with Disabilities Act of 1990, P.L. 101-336, 42 U.S.C. § 12101 *et seq.* 4, 17

42 U.S.C. § 12102(2) 17

42 U.S.C. § 12111 17

42 U.S.C. § 12112 17

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
LHWCA § 2(10), 33 U.S.C. § 902(10)	6
LHWCA § 7, 33 U.S.C. § 907	5
LHWCA § 8, 33 U.S.C. § 908	5
LHWCA § 8(a), 33 U.S.C. § 908(a)	6
LHWCA § 8(b), 33 U.S.C. § 908(b)	6, 8
LHWCA §§ 8(c)(1) through (20), 33 U.S.C. §§ 908(c)(1) through (20)	7, 9
LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21)	7, 8, 12, 14
LHWCA § 8(e), 33 U.S.C. § 908(e)	7, 8
LHWCA § 8(f), 33 U.S.C. § 908(f)	12, 15
LHWCA § 8(h), 33 U.S.C. § 908(h)	*passim*
LHWCA § 8(j), 33 U.S.C. 908(j)	13, 14
LHWCA § 19(d), 33 U.S.C. § 919(d)	6
LHWCA § 21(b)(1), 33 U.S.C. § 921(b)(1)	6
LHWCA § 22, 33 U.S.C. § 922	*passim*
LHWCA § 39(a), 33 U.S.C. § 939(a)	6
LHWCA § 39(c)(2), 33 U.S.C. § 939(c)(2)	17
LHWCA § 44, 33 U.S.C. § 944	12, 14, 15
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, 86 Stat. 1251	6
Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426, 98 Stat. 1639	12, 13, 15
20 CFR § 701.201	6
20 CFR § 702.285	14
20 CFR § 702.286	14
Miscellaneous:	
Cong. Record p. 5403 (March 2, 1927)	6
Cong. Record p. 9210 (July 27, 1982)	15
50 Federal Register 389 (Jan. 3, 1985)	14
H.Rept. 1767, 69th Cong., 2d Sess.	16
H.Rept. 1244, 73rd Cong., 2d Sess.	16
H.Rept. 1945, 75th Cong., 3rd Sess.	8
H.Rept. 98-570, 98th Cong., 1st Sess.	15
H.Rept. 98-1027, 98th Cong., 1st Sess.	15

TABLE OF AUTHORITIES—Continued

Page

Longshore Desk Book, Benefits Review Board, United States Department of Labor (1987) 6, 8, 11
Longshore Procedure Manual, Office of Workers' Compensation, Employment Standards Administration, U.S. Department of Labor (Sept. 1989) .. 14
OWCP Annual Report To Congress FY 1993, Office of Workers' Compensation Programs, U.S. Department of Labor (1994) 9, 12, 17
S.Rept. 973, 69th Cong., 1st Sess. 16
S.Rept. 588, 73rd Cong., 2d Sess. 16
S.Rept. 1988, 75th Cong., 3rd Sess. 8
S.Rept. 98-81, 98th Cong., 1st Sess. 12, 13, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-820

METROPOLITAN STEVEDORE COMPANY,
Petitioner,

v.

JOHN RAMBO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SHIPBUILDERS COUNCIL OF AMERICA, THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF PETITIONER

THE INTERESTS OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C.

§ 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business at 110 ports on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 10,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of 214 insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance, employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a

non-profit and cost effective basis for selected employers over the long term.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers covered by the Longshore and Harbor Workers' Compensation Act and a group self-insurance facility, and thus have an interest in the proper payment of disability benefits to a claimant who later experiences an increased wage-earning capacity.

The parties have consented to the filing of this brief. Letters of consent have been filed with the clerk pursuant to Rule 37.3 of the Court.

SUMMARY OF ARGUMENT

The Ninth Circuit's narrow reading of § 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act"), relying on the dated *McCormick S.S. Co. v. United States Employees' Compensation Committee,* 64 F.2d 84 (9th Cir. 1933), reads into the term "change in conditions" a limitation to "change in 'physical' condition[]" that simply is not found in the plain language of the section. Consequently, this interpretation precludes a § 22 modification when a claimant subsequently experiences a real increase in actual wages due to an increased wage-earning capacity, i.e., a change in *economic* conditions. This restrictive interpretation, in fact, renders useless the wage-earning capacity premise underlying the entire LHWCA scheme for the payment of disability benefits.

A close reading of the statute fully supports the Fourth Circuit's contrary conclusion in *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985). That Court found that § 22 permits modification on bases other than that of a change in physical condition and specifically sanctioned modification for a change in economic condition resulting from an increased wage-earning capacity.

The *Fleetwood* Court's reasoning is consistent with the wage-earning capacity premise woven throughout the fabric of the LHWCA and specifically set forth at LHWCA § 8(h). Applied properly, this provision, which requires the Department of Labor to consider both physical and economic factors in making the initial determination of wage-earning capacity, also governs subsequent § 22 modification determinations. *Amici* submit that an increased wage-earning capacity is ordinarily sufficient justification to trigger a § 22 modification. And, as the Department of Labor's administrative adjudications below acknowledged, a complete cessation of wage-earning *incapacity* can be sufficient to terminate disability benefits.

Any other result can only be reached by reading out of the Act its wage-earning capacity premise, including the express economic factors set forth in LHWCA § 8(h). Such a reading is clearly not supported by the plain language of the LHWCA, including § 22, several specific amendments made to the Act in 1984, or its legislative history. Moreover, unless reversed, the Ninth Circuit's reading will also frustrate the public policy underlying the recently enacted Americans with Disabilities Act of 1990, P.L. 101-336, 42 U.S.C. § 12101 *et seq.*

ARGUMENT

I. THE UNDELYING WAGE-EARNING CAPACITY PREMISE AND PLAIN LANGUAGE OF THE LHWCA ALLOW § 22 MODIFICATION FOR A SUBSEQUENT INCREASE IN A CLAIMANT'S WAGE-EARNING CAPACITY

A. The LHWCA Statutory Scheme For Calculating Disability Benefits Is Based On 'Wage-Earning Capacity'

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act"), is a federal workers' compensation statute designed to provide indemnity compensation and medical benefits to certain classes of maritime employees injured on covered worksites.[1] *Northeast Marine Terminal Company, Inc. v. Caputo,* 432 U.S. 249 (1977). Like the New York Compensation Statute upon which it was modeled after this Court held that state compensation statutes could not constitutionally reach injuries incurred upon the navigable waters of the United States, *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917), and that Congress could not delegate regulation of federal maritime jurisdiction to the states, *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920), § 8 of the LHWCA, 33 U.S.C. § 908, sets forth four distinct classifications of indemnity benefits, labeled "disability" benefits, designed to recompense disabled workers according to the severity and length of the disability. *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268, at 273 (1980). In turn, the LHWCA expressly defines the term 'disability,' to mean, in pertinent part, "incapacity because of injury to earn the wages which the employee was re-

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[1] The LHWCA distinguishes between disability claims and medical claims. The Act provides a separate method to determine and recompense disabled workers for the latter. LHWCA § 7, 33 U.S.C. § 907. Medical benefits are *not* subject to § 22 modification.

ceiving at the time of injury in the same or any other employment[.]" [2]

The concept of wage-earning capacity is inherent in the two sections of the Act dealing with disabilities that are 'total' in character. LHWCA §§ 8(a) and (b). To be totally disabled—whether permanently or partially—is to be without any wage-earning capacity whatsoever. In analyzing an initial claim for total disability, the Department of Labor applies the essential wage-earning capacity factors found in LHWCA § 8(h), including the economic factors discussed below.[3] See *Longshore Desk Book*, pp. 8.8-8.18, Benefits Review Board, United States Department of Labor (1987).

The Appellate Courts agree that wage-earning capacity is largely an economic concept. See, e.g., *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381 (4th Cir. 1994) ("Because of the statutory focus on 'the claimant's *capacity* for work, not actual employment,' disability under the LHWCA is 'an economic, rather than a purely physical, concept.' ") (citations omitted); *Amer-*

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[2] LHWCA § 2(10), 33 U.S.C. § 902(10), was part of the House amendment to the original Senate bill, and a cornerstone of the 1927 Act. See Congressional Record 5403 (March 2, 1927); it originally read as printed above. The 1984 Amendments added new language to the definition dealing with occupational disease. See *Bath Iron Works Corp. v. Director, OWCP*, 113 S.Ct. 692 (1993).

[3] The LHWCA originally provided that claims would be heard by Deputy Commissioners. Since the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, the LHWCA requires that controverted claims be submitted to an ALJ and then to the Benefits Review Board for administrative review, if requested. 33 U.S.C. §§ 919(d) and 921(b)(1). The Secretary of Labor is authorized to administer the provisions of the Act. 33 U.S.C. § 939(a). In turn the Secretary has delegated administrative authority to the Director, Office of Workers' Compensation Programs. 20 CFR § 701.201. For the purposes of this brief, *Amici* chose to refer to any or all of these elements of the Department of Labor as the "Department of Labor."

ican Mutual Insurance Co. of Boston v. Willie B. Jones, 426 F.2d 1263, 1265 (D.C. Cir. 1970) ("The Act makes clear that 'disability' is an economic and not a medical concept."); *John W. McGrath Corp. v. Hughes,* 289 F.2d 403, 405 (2d Cir. 1961) ("[T]his definition [of disability] clearly imposes upon the [Department of Labor] and the reviewing courts the duty to evaluate the extent of a claimant's disability in economic rather than medical terms."). Accordingly, under certain conditions, a claimant may be found to be totally disabled even though he has actual wages because, after considering all of § 8(h)'s economic factors, the claimant is deemed to be without a wage-earning capacity.

Congress was less subtle with the statutory definitions of the two disability classifications that are 'partial' in character. The wage-earning capacity premise of the LHWCA has been expressly incorporated into both definitions: LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21), ("In all other cases in the class of [permanent partial] disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's *wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.*") (emphasis added)[4]; and LHWCA § 8(e), 33 U.S.C. § 908(e), ("Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his *wage-earning capacity after the injury in the same or another employment, to be paid during*

[4] Certain permanent partial benefits, i.e., those scheduled at LHWCA § 8(c)(1) through (20), are to be calculated and paid to injured claimants regardless of whether or not the claimant has experienced a loss of wage-earning capacity. See *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268 (1980); *Bath Iron Works Corp. v. Director, OWCP,* 113 S.Ct. 692 (1993).

the continuance of such disability, but shall not be paid for a period exceeding five years.") (emphasis added).

The factors determining wage-earning capacity under §§ 8(c)(21) and (e) are set forth in LHWCA § 8(h), 33 U.S.C. § 908(h)[5]: the norm is *actual earnings,* with the Department of Labor required to consider the complete range of physical and *economic* factors, including, "the nature of [the] injury, the degree of physical impairment, [the claimant's] usual employment, and any other factors or circumstances in the case *which may affect his capacity to earn wages* in his disabled condition[]" and fix such capacity "in the interests of justice." Notably, the Department is authorized to take into account the effect of a disability "as it may naturally extend into the future." Wage-earning capacity analysis is done on a case-by-case basis at the initial claim stage. See *Longshore Desk Book,* pp. 8-36.

With the obvious and necessary exception of permanent total disability, the language of the Act describing the three other disability classifications expressly requires payment of the specified benefit "during the continuance" of the stated disability. LHWCA §§ 8(b), (c)(21), and (e). This express temporal condition on these benefit payment classifications has been an integral part of the Act since its enactment in 1927. Thus, even without consid-

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[5] § 8(h) is not an original part of the LHWCA. It was added by the 1938 Amendments to the Act because Congress wanted to settle "the complex question of the proper factors to be considered in connection with the determination of an employee's wage-earning capacity after injury." Congress was primarily concerned with an injured employee's "future ability to earn," particularly where an employee might continue to work for a beneficent employer or where an unscrupulous employer might continue the employment relationship until "the limitations in the act . . . had run" and subsequently fire the injured employee. See H.Rept. 1945, 75th Congress, 3rd Sess.; S.Rept. 1988, 75th Congress, 3rd Sess. Thus Congress was concerned with an injured employee's ultimate wage-earning capacity; a determination that may only manifest itself in the future and be subject to a change in conditions.

ering the plain language of LHWCA § 22 permitting modification of payments or awards for "a change in conditions," as discussed below, it is readily apparent that the Congressional scheme has always allowed for both the termination of disability payments once a claimant's wage-earning capacity is no longer diminished from its pre-injury level and for proportionate reduction of such payments whenever a claimant experiences a subsequent increase in wage-earning capacity, within the constraints of a § 8(h) wage-earning capacity analysis.

Approximately 90% of LHWCA disability claims are not contested and therefore are not subject to an administrative hearing and compensation order. Employers pay most claims voluntarily, i.e., without a compensation order. See *OWCP Annual Report To Congress FY 1993*, Office of Workers' Compensation Programs, U.S. Department of Labor 1994). Whether after an award or voluntary payment, LHWCA § 22 allows modification for a "change in conditions" and requires the Department of Labor to issue a "new compensation order which may terminate, continue, reinstate, increase, or decrease" the disability payments being paid.

B. The Plain Language And Purpose of § 22 Allow Modification For A Subsequent Change In A Claimant's Wage-Earning Capacity

Since the inception of the Act, § 22, 33 U.S.C. § 922, has permitted modification for a "change in conditions" of any compensation award or payments, other than for the 'scheduled' benefits now set forth in §§ 8(c)(1) through (20). See I-D below. Since the 1984 Amendments to the Act, § 22 is the sole LHWCA provision authorizing modification of an award or voluntary payments, and sets forth the procedure for the parties to seek a modification. See I-C below.

Despite the unconditional language and broad sweep of the term "a change in conditions", the Court below rejected both of the Labor Department's administrative

determinations and upheld dated circuit precedent. As the Court explained, "[M]ere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement. . . . Rather a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition." *Rambo v. Director, Office of Workers' Compensation Programs,* 28 F.3d 86 (9th Cir. 1994).

The flaw in the Court's reasoning is readily apparent. At the time of an award, a determination of wage-earning capacity frequently is no more than an educated guess on the part of the administrative adjudicators. Voluntary benefit payments suffer as well from the same shortsightedness. An original determination of wage-earning capacity utilizing LHWCA § 8(h) economic factors, as noted above, is based on conjecture including "the effect of the disability as it may naturally extend into the future." Subsequent changes in wage-earning capacity, brought about, for example, by successful retraining in a more lucrative employment, as below, simply cannot be foreseen at the time of the initial award. Consequently Congress expressly incorporated the § 22 modification provision into the LHWCA with the broadest possible test allowing for a new award, i.e., "a change in conditions." This is certainly designed to correct any initial determination of wage-earning incapacity that may have proven wrong "into the future."

The decision below ignores the central importance to the LHWCA of § 8(h)'s economic wage-earning capacity factors. *Amici* submit that these factors used to determine wage-earning capacity at the initial award stage are, in fact, the range of conditions that Congress anticipated could subsequently change, and hence be subject to a § 22 modification order.

While the Ninth Circuit's limitation to "change in 'physical' conditions" may appear to have the desired characteristics of a simple *per se* rule, it ignores the eco-

nomic factors set forth in § 8(h) that must be considered whenever a claimant's wage-earning capacity is called into question. More importantly, in choosing to substitute its judgment for that of Congress, the Court below ignores the unambiguous expression of Congressional intent to permit § 22 modification for the unconditional "change in conditions" and opinions of this Court governing statutory interpretation. "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Cowart v. Nicklos Drilling Co.*, 505 U.S. ——, 112 S.Ct. 2589, 2594 (1992); "When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. ——, 111 S.Ct. 599, 604 (1991); "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1983).

On the other hand, the Department of Labor did recognize Congressional intent in making the § 22 modification below, and considered the economic factors set forth in § 8(h), just as it did with the initial award. Since *Fleetwood*, this has become the standard practice and position of the Department.[6] The Department understands that § 22 modification, properly governed by § 8(h) factors, is consistent with, and necessitated by, the wage-earning capacity premise of the Act. Both of the Department's adjudications below acknowledged this linkage.

Amici submit that the legislative term "change in conditions" encompasses a claimant's real increase in actual earnings subsequent to the initial determination of wage-earning capacity, thus permitting modification due to an

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[6] See *Longshore Desk Book*, p. 22-3, Benefits Revied Board, U.S. Department of Labor (1987).

increased wage-earning capacity. The very essence of the Act's disability scheme requires no less.

C. The 1984 Amendments Reaffirm Congressional Intent To Permit Modification Upon A Subsequent Change In Wage-Earning Capacity

Congress last amended the LHWCA in 1984 in an effort to control what had by then become a very costly compensation program. "One major thrust of this legislation is to reduce the costs of providing benefits under the LHWCA." S. Rept. 98-81, p. 41, 98th Congress, 1st Session. Included within the Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426 (the "1984 Amendments") are several amendments dealing with runaway costs and the widespread abuse common to the program. One of these amendments deals specifically with policing of the LHWCA § 44 Special Trust Fund into which employers are permitted to place § 8(f) claims, as the Petitioner did in this case.[7]

Three particular changes made by the 1984 Amendments defeat the decision below. Section 8(c)(1) amended LHWCA § 8(c)(21) to delete the then existing authority, which had been in the statute since its inception, of the Department of Labor "to reconsider[] the degree of such [permanent partial] impairment[.]" As explained in the accompanying Senate Report, this was

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[7] LHWCA § 8(f) is designed primarily to encourage the hiring of disabled workers by not saddling an employer who hires a disabled employee with the full costs of a second disabling injury. The employer can place the claim into the § 44 Special Trust Fund after 104 weeks of benefit payments. In Calendar year 1993 the § 44 Special Trust Fund collected over $102 million dollars in assessments from covered employers and insurance carriers, and paid out over $103 million dollars to some 4,652 second injury fund claimants and others qualifying for secondary § 44 benefits. *OWCP Annual Report To Congress FY 1993*, Office of Workers' Compensation Standards, Employment Standards Administration, United States Department of Labor. *Amici* believe that the fund has an unfunded liability in excess of $1.5 billion.

done to "limit[] the method for *modifying or reconsidering the degree of disability* to that provided in § 22[]," and to "make[] *determinations of wage earning capacity* subject [solely] to section 22 modification." S. Rept. 98-81, 98th Cong, 1st Sess., pp. 43 and 18, respectively (emphasis added).[8]

Also of obvious importance, § 8(h) of the 1984 Amendments added a new § 8(j) to the LHWCA, 33 U.S.C. 908(j), which permits employers the right to obtain, semi-annually, wage and income statements from disabled workers receiving compensation.[9] There can be

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[8] S. Rept. 98-81 sheds further light on Congressional understanding of the "basis (sic) or grounds" for seeking a § 22 modification. The Committee of jurisdiction fully expects that § 22 modification, whether within the present one year time limitation or without, as proposed by the legislation then under consideration, permits claimants to "apply for increased benefits for wage loss or for greater physical disability at a time *when the full effects of an injury may manifest themselves.*" S. Rept. 98-81, pp. 37-38, (emphasis added). This expectation fully comports with the wage-earning capacity premise of § 8(h) of the Act, as noted above. See n.12, *infra*, for an explanation of the changes actually made to § 22 in 1984.

[9] LHWCA § 8(j) reads in its entirety:

(j)(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who—

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings,

and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation pay-

only one reason for this particular change. In keeping with the Act's fundamental wage-earning capacity premise, as outlined above, Congress granted to employers and insurance carriers statutory authority to periodically police their rolls of disabled claimants, including those placed in the § 44 Special Trust Fund, in order to check for disabled workers who had experienced an increase in wage-earning capacity subsequent to the original award or voluntary payment.[10] Logically, given the LHWCA § 8(c)(21) change discussed above, Congress certainly intended § 22 modification to become the next step in the process if and when a wage and income check reveals an increased wage-earning capacity on the part of a claimant.

The primary sponsor of the new § 8(j) certainly expected as much. He explained the rational behind this language during floor debate on a precursor of the bill that was eventually enacted.[11]

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able to the employee in any amount and on such schedule as determined by the deputy commissioner.

The regulations later promulgated by the Director, OWCP implementing the new § 8(j) faithfully reflect the intent of the statute and can be found at 20 CFR Ch. VI § 702.285 and § 702.286. The Director has also published a standard form, LS-200, as the statute so requires, for the use of employers and insurance carriers. See the Director's *Longshore Procedure Manual,* Office of Workers' Compensation, Employment Standards Administration, U.S. Department of Labor, ch. 10-200 (Sept. 1989).

[10] Annual policing the Special Fund was standard procedure for the Director, Office of Workers' Compensation Programs at the time of the 1984 Amendments, and was subsequently made part of OWCP Regulations, 20 CFR § 702.285. See 50 Fed. Reg. 389 (Jan. 3, 1985). The Director also utilizes the LS-200 forms to monitor a claimant's employment status, and matches this data with other government records. If and when a claimant is found to have an increased wage-earning capacity, the Director will seek a § 22 modification, be it voluntarily or not on the part of the claimant. See the Director's *Longshore Procedure Manual,* ch. 6-300.

[11] The new § 8(j) language originally appeared as § 7(h) of S. 1182 in the 97th Congress; it was replicated as § 7(h) of S. 38

> "Further, a disabled employee has the obligation to report to his employer not less than semi-annually any earning (sic) from employment. . . *This provision is in response to the problem of a disabled employee receiving workers' compensation benefits while he has actually returned to gainful employment.*" (emphasis added) Cong. Record page 9210, July 27, 1982 (Statement of Nickles, Senator).

Finally § 16 of the 1984 Amendments in turn amended LHWCA § 22, *inter alia*, to make it clear that employers and insurance carriers which had previously placed claims in the LHWCA § 44 Special Trust Fund, pursuant to LHWCA § 8(f)'s second injury provisions, could seek modification under § 22, as Petitioner has in the present case.[12]

All three of these changes conform with the wage-earning capacity premise inherent throughout the LHWCA since its inception, and further undermine the Ninth Circuit's reasoning below.

D. The Pre 1984 Legislative History Of § 22 Does Not Support The Ninth Circuit's Narrow Reading

As noted above, LHWCA § 22's "change in conditions" language dates to the original Longshoremen's and Har-

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in the 98th Congress. S. 38, as introduced, was identical to S. 1182 as passed the Senate on July 27, 1982 in the 97th Congress; it was later enacted in the 98th Congress after further amendment. P.L. 98-426. The language that finally became § 8(j) of the LHWCA is identical to that first introduced as § 7(h) of S. 1182 in the 97th Congress.

[12] Despite the fact that in 1984 both the Senate and House passed bills contained identical language deleting the present one year time limitation on § 22 modification, the Conference committee dropped this change in favor of language permitting the policing of the § 44 Special Fund by employers and carriers, without any explanation. See S. Rept. 98-81, H.Rept. 98-570, H.Rept. 98-1027 (the Conference Report). The initial House Report at page 29 points out that § 22 modification is permitted "on the grounds of changed circumstances or mistakes."

bor Workers' Compensation Act of 1927. See S. Rept. 973, 69th Cong., 1st Sess.; H. Rept. 1767, 69th Cong., 2d Sess. Neither report gives any indication that Congress intended to limit the term to the restrictive reading later adopted by the Ninth Circuit in *McCormick*.

Shortly after *McCormick*, Congress amended the Act in 1934 and added "mistake in determination of fact" to the original "change in conditions" upon which a modification order could be obtained. Congress did this "so as to broaden the grounds" for modification orders and fully expected to see "increase[s] or decrease[s] in [] compensation . . . when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the Act. . ." S. Rept. 588, 73rd Cong., 2d Sess., p-3; H. Rept. 1244, 73rd Cong., 2d Sess., p-4.

Once again, Congress gave no indication that the term "change in conditions" was to be construed as narrowly as in *McCormick*. In fact Congress never even acknowledged the existence of the decision, but instead chose to grant wide discretion to the Department of Labor to make those modifications "desirable . . . to render justice under the Act." As of this time the Act did not have a definition of "wage-earning capacity" to guide the Department of Labor. See n.5, *supra*. It seems likely, then, that this amendment to § 22 was an attempt to comport the Act's wage-earning capacity premise, including the economic factors later explicitly made a part of § 8(h), with § 22 modifications.

II. THE NINTH CIRCUIT'S DECISION UNDERMINES FEDERAL PUBLIC POLICY MANDATES CONCERNING THE HIRING OF HANDICAPPED WORKERS

The question before the Court takes on added significance when considered in light of recent public policy changes concerning the hiring of handicapped workers.

All but a handful of employers covered by the LHWCA are now also covered by the hiring mandates of Title I of the Americans with Disabilities Act, P.L. 101-336 (the "ADA").[13]

Amici appreciate the fact that this Court does not address hypothetical questions, and has not yet had the opportunity to review the ADA but point out that, should this Court uphold the decision below, the ADA mandate to hire and promote the disabled would be seriously undermined. The ADA requires that LHWCA covered employers not "discriminate against a qualified individual with a disability . . . [in] the hiring, advancement, or discharge of employees. . . job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. Often this statutory protection will encompass those with work related injuries receiving compensation payments pursuant to either the LHWCA or a state worker's compensation act. Many, but not all, such individuals are indeed disabled to the point that their disability "substantially limits one or more of the major life activities of such individual" and thus would qualify for the protections of the ADA. 42 U.S.C. § 12102(2).

Indeed, *Amici* submit that the facts in this case meet this test. Respondent Rambo's back and leg injuries, characterized as permanent partial by the initial ALJ decision in 1983, were thought to have impaired his abil-

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[13] Title I of the ADA became effective on July 26, 1992 for employers with 25 or more employees. Two years later the threshold dropped to 15 or more employees. 42 U.S.C. § 12111. Few, if any, employers covered by the LHWCA have fewer than 15 employees. LHWCA covered employers also pay for vocational rehabilitation. LHWCA § 939(c)(2) directs the Department of Labor to arrange for the vocational rehabilitation of permanently disabled employees. 33 U.S.C. § 939(c)(2). Presently some $4.8 million is annually expended from the § 44 Special Fund on vocational rehabilitation. See *OWCP Annual Report To Congress FY 1993*, Office of Workers' Compensation Standards, Employment Standards Administration, United States Department of Labor, p. 43.

ity to earn his usual wages as a longshoreman, thereby reducing his wage-earning capacity. Ultimately, of course, this assumption proved incorrect.[14]

While the facts as they unfolded all took place prior to the effective date of the ADA, and thus were not argued below, *Amici* submit that the public policies underscoring the ADA cannot be ignored in the context of employer financial obligations under the LHWCA and other workers' compensation statutes. Employers cannot be expected to incur both financial liabilities. Therefore *Amici* believe that LHWCA § 22 modifications need to be construed in light of the ADA.

CONCLUSION

The court below read a limitation into the Act that simply is not there. By limiting § 22 modification to "change in 'physical' condition[]" the Ninth Circuit has repudiated the wage-earning capacity premise underlying the LHWCA. Permitting continued recompense to employees with an increased wage-earning capacity is simply not within the statutory scheme. Congress intended, and the LHWCA so provides, that if and when a disabled worker's actual wages increase to the point where they equal or exceed his/her pre-injury level of earnings, the factors used to determine statutory disability may be re-examined, and the disability may, in fact, be deemed to cease. Section 22 modification is the procedure provided by the LHWCA for an employer to seek termination or reduction of benefits for a "change in conditions," as the

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[14] Petitioner, the original employer of the Respondent, is a member of the Pacific Maritime Association ("PMA"), the designated multi-employer management group that collectively bargains with the International Longshoremen's and Warehousemen's Union ("ILWU"). The training program that Respondent successfully completed is jointly sponsored by PMA-ILWU. Respondent is now eligible to be employed by any PMA member, including Petitioner, as a crane operator with seniority rights.

facts dictate, thus maintaining consistency with the statutory scheme.

Amici appreciate that this is a two edged sword, *i.e.*, that modification works both ways, and that an injured employee's wage-earning capacity may decrease over time, thus compelling a modification upward. But this is the way Congress designed the LHWCA to work.

Amici submit that the Ninth Circuit's interpretation of § 22 is clearly insupportable and must be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF INDUSTRIAL INDEMNITY INSURANCE COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 22 of the Longshore and Harbor Workers' Compensation Act permits modification of a compensation award when successful retraining and reemployment efforts increase the worker's earning capacity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 9

I. MODIFICATION OF PERMANENT DISABILITY AWARDS SUBSEQUENT TO CHANGE IN WAGE EARNING CAPACITY PRESERVES SCARCE ECONOMIC RESOURCES AND PROMOTES DELIVERY OF BENEFITS TO DESERVING WORKERS 9

II. FLEXIBILITY IN MODIFICATION PROCEEDINGS FURTHERS PUBLIC POLICY AND CONGRESSIONAL INTENT TO PROMOTE FULL EMPLOYMENT AND ENGAGE INDUSTRY EMPLOYERS IN THE PROCESS OF REHABILITATING INJURED WORKERS WHENEVER POSSIBLE 14

III. ALLOWING MODIFICATION BASED UPON CHANGE IN EARNING CAPACITY REDUCES ECONOMIC WASTE BY REDUCING COSTS OF ADMINISTRATION OF 8(F) CLAIMS TO BOTH EMPLOYERS AND THE DEPARTMENT OF LABOR 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aetna Life Insurance v. Moses, 287 U.S. 530 (1933) 6

Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992) 4

Bath Iron Works v. White, 584 F.2d 569 (1st Cir. 1978) 4

Day v. Weinberger, 522 F.2d 1154 (9th Cir. 1975) 5

Fleetwood v. Newport News Shipbuilding and Dry Dock Co., 776 F.2d 1225 (4th Cir. 1985) 5

Hole v. Miami Shipyards Corp., 640 F.2d 769 (5th Cir. 1981) 6

Long v. Director, Office of Workers' Compensation Programs, 767 F.2d 1578 (9th Cir. 1985) 4

Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980) 3

Rambo v. Director, Office of Workers' Compensation Programs, 28 F.3d 86 (9th Cir. 1994) 9

Randall v. Comfort Control, Inc., 725 F.2d 791 (D.C. Cir. 1984) 4, 5

Southern Pacific Co. v. Jensen, 224 U.S. 205 (1917) 3

Todd Shipyards Corp. v. Allan, 666 F.2d 399 (9th Cir. 1982) 5

Travellers Insurance Co. v. McLellan, 288 F.2d 250 (2d Cir. 1961) 4

TABLE OF AUTHORITIES – Continued

Page

BENEFITS REVIEW BOARD CASES

Bethard v. Sun Shipbuilding and Dry Dock Co., 12 BRBS 691 (1980) 5

Blake v. Ceres, Inc., 19 BRBS 219 (1987) 12

Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979) 4, 5

Fleetwood v. Newport News Shipbuilding and Dry Dock Co., 16 BRBS 282 (1984) 5

Hughes v. Litton Systems, Inc., 6 BRBS 301 (1977) 5

Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990) 13

FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C. 557(c) 5

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. 2

33 U.S.C. 902(10) 3, 4

33 U.S.C. 903 (1927) 3

33 U.S.C. 903(e) 6

33 U.S.C. 904 3

33 U.S.C. 905 6

33 U.S.C. 908(c)(21) 3, 4, 6

33 U.S.C. 908(f) 6, 7, 8, 15

33 U.S.C. 908(h) 4

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. 910 4

33 U.S.C. 922 ..... 8, 9, 12, 13, 18

33 U.S.C. 932 3

33 U.S.C. 933 6

33 U.S.C. 939 6

33 U.S.C. 944 ..... 6, 7, 8, 16, 17

OTHER AUTHORITIES

Larson, *The Law of Workmen's Compensation* (1989) 3

1984 U.S. Code and Congressional Administrative News 7, 8

House Report on Conference Report on S.38, L.H.W.C.A. Amendments of 1984, BRBS Rel. 256-11/84 ..... 7, 8

130 Congressional Record, Sept. 18, 20, 1984 16

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed, with the consent of the parties, by Industrial Indemnity Insurance Company in support of Petitioner.

In 1920, Contractors Insurance Agency of California, a forerunner of Industrial Indemnity, was founded. A year later, in 1921, Contractors Indemnity Exchange, a reciprocal of Contractors Insurance Agency of California, was founded. In 1931, Mr. K. K. Bechtel assumed chairmanship of the advisory committee of the two companies and continued to lead the organization for the next 40 years. The organization became known as Industrial Indemnity Insurance Company in 1933.

From 1934 through 1939, the company insured contractors of major public works projects in the State of California and the western United States, including the Golden Gate Bridge, the San Francisco Bay Bridge, Shasta Dam, Hunters Point Drydocks, Hetch Hetchy Dam, and the Colorado River Aqueduct.

The company led the industry in implementing safety procedures to minimize losses by issuing hard hats at construction sites and establishing field hospitals at isolated construction locations to ensure prompt medical care for injured workers. In 1935, the company's premium volume hit one million dollars. In 1942, the company drafted and published its first edition of *Safety Engineering Standards*, which became an industry standard and is still in circulation.

During World War II, Kenneth Bechtel founded Marin Ship shipyard in Sausalito, California, and his

brother, Steven Bechtel, founded Cal Ship shipyard in Oakland, California. In 1945, Industrial Indemnity celebrated its 25th anniversary with premiums topping ten million dollars.

Post war, Industrial Indemnity expanded its operations across state borders, hiring its own staff counsel for policyholder defense in 1953 and installing IBM computers in 1955. In 1960, leadership of the company was assumed by Mr. Fred Drexler, a member of the State of California Governor's Commission on reform of workers' compensation laws, who continued to guide the company's economic growth and played a major role in the 1977 reform of California state workers' compensation programs.

We respectfully submit that Industrial Indemnity's historical presence in the industry since the inception of the Longshore Act, its essential role in developing the maritime workers' compensation insurance industry, and its vast experience in delivering compensation benefits to injured workers lends a valuable perspective on the question presented for review.

SUMMARY OF ARGUMENT

The Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. 901, et seq., was created by Congress in 1927 to provide a unique workers' compensation scheme for a discrete class of maritime employees who were not subject to state workers' compensation

laws.[1] In creating the Act and delegating to the Department of Labor its administration and adjudication of claims arising under it, Congress attempted to balance the conflicting interests of injured maritime employees in need of certainty of recompense and those of employers in need of economic protection from the costs of maintaining liability insurance.[2]

Throughout its history, the Act and its subsequent amendments have reflected, in both design and administration, public policy concerns to provide adequate compensation to injured workers and reduce economic waste. Certain provisions of the 1927 Act, unchanged by subsequent amendments, mandate that each covered employer provide compensation benefits as defined by the Act and either purchase insurance or prove to the Secretary of Labor that it has the financial ability to pay such compensation.[3] However, the Act has consistently and expressly defined disability on the basis of economic loss associated with a physical impairment, and awarded disability compensation for specific types of injuries only if those injuries lessen the worker's wage earning capacity.[4]

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[1] 33 U.S.C. 903 (1927); *Southern Pacific Co. v. Jensen*, 224 U.S. 205 (1917).

[2] *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980).

[3] 33 U.S.C. 904, 932.

[4] 33 U.S.C. 902 (10); 33 U.S.C. 908(c)(21); *see generally*, 2 A. Larson, *The Law of Workmen's Compensation* Sec. 57.14 (discussion of social value and history of earnings impairment theories of compensation versus physical impairment theories of compensation), and Sec. 57.14(j) (wage loss compensation reduces

Congressional intent and the purpose of the Act is to compensate for lost wage earning capacity.[5] It is fundamental to the Act that "disability" is an economic concept. Section 902(10) defining disability has not been changed by Congress or abrogated by case law. As Justice Skelly Wright tersely stated in *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 799 (D.C. Cir. 1984), "[h]owever, as the question of disability is one of degree, so is the amount of recovery."

Because compensation for wage loss is defined by comparing pre-injury wages to post injury wage earning capacity, the Act expressly instructs, in detail, how both pre-injury wages and post injury wage earning capacity are to be calculated.[6] Section 8(h) mandates a multifactor analysis of the injured worker's wage earning capacity, whether actual post injury earnings fairly and reasonably measure loss of wage earning capacity and, if not, mandating a determination of fair and reasonable post injury wage earning capacity.[7] This method of determination of earning capacity is uniformly employed by the administrative law judges, the Benefits Review Board (BRB), and in the circuits.[8] Provisions of the Administrative

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economic waste by allocating limited compensation dollars to those with actual earnings impairment).

[5] *Long v. Director, Office of Workers' Compensation Programs*, 767 F.2d 1578, 1582 (9th Cir. 1985).

[6] 33 U.S.C. 908(c)(21), 910, 908(h).

[7] *See also, Randall*, 725 F.2d at 724-725 (citing *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979)).

[8] *Randall, supra; Bath Iron Works v. White*, 584 F.2d 569 (1st Cir. 1978); *Travelers Insurance Co. v. McLellan*, 288 F.2d 250 (2d Cir. 1961); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th

Procedure Act (APA), which are applicable to adjudication of claims arising under the Act by the federal administrative law judges of the Department of Labor, require adjudicators to make specific findings on all relevant evidence and ensure due process in the course of determining post injury wage earning capacity and compensation benefits.[9] Additionally, the BRB case law has adopted a formula for adjusting post injury wage earning capacity to the average weekly wage at the date of injury further protecting injured workers by ensuring fairness and reasonableness of determination of post injury wage earning capacity.[10]

Since the Benefits Review Board held that Section 922 modification may be granted based on changes in the claimant's earning capacity as well as changes in his/her physical condition in *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225 (4th Cir. 1985), the same factors of evaluating the original determination of post injury wage earning capacity have also been applied in modification proceedings.[11] And even before the BRB decision in *Fleetwood*, the Fifth Circuit recognized that modification based on a change in

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Cir. 1992); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 (9th Cir.), *cert. denied*, 459 U.S. 1034, 103 S.Ct. 444 (1982); *Devillier, supra*; *Hughes v. Litton Systems, Inc.*, 6 BRBS 301 (1977).

[9] 5 U.S.C. Sec. 557(c); *see, Randall, supra*, at 724; *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975).

[10] *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980).

[11] *See e.g., Randall*, 725 F.2d at 795.

earning power was in harmony with Congressional intent.[12]

The Act evidences further policy concerns with the continued economic viability of covered employers by providing that employer liability under the Act is to be exclusive and in place of all other liability for damages at law or in admiralty, 33 U.S.C. 905, and that, although the employee may either seek benefits under the Act or pursue a third party tort feasor, the employer must receive offset against its liability under the Act for all third party civil recoveries or other disability compensation received by a claimant.[13]

Section 939 of the Act, providing that the Secretary of Labor shall direct the vocational rehabilitation of permanently disabled workers under the Act, demonstrates Congressional concern with returning injured workers to productive roles in the economy and thereby limiting the ultimate liability of covered employers for on-going disability compensation during the lifetimes of injured workers.[14]

And Sections 908(f) and 944 of the Act reflect Congressional intent to provide employers with incentive to hire workers with pre-existing permanent disabilities by establishing the Special Fund, to be administrated by the

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[12] *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 771-72 (5th Cir. 1981).

[13] 33 U.S.C. 903(e), 933(a)-(i), *see, e.g., Aetna Life Insurance v. Moses*, 287 U.S. 530, 542 (1933) (affirming employers' lien and credit rights so as not to permit double recovery by a claimant and thereby increase costs of insurance required by the Act).

[14] 33 U.S.C. 939; *see*, Section 8(c)(21) (mandating payment of wage loss disability for the duration of the disability).

Secretary, which will assume payment of on-going permanent disability compensation in the event the disabled worker is further disabled consequent to an occupational injury. The Fund is financed primarily by mandatory annual contributions, or assessments, .by each self-insured employer or carrier covered by the Act.[15]

In 1984, in amending the Act, Congress again expressed its concern with creating a statutory scheme which provided adequate remedies for injured workers, promoted economic viability of maritime employers and insurers, and conserved scarce economic resources. The 1984 Amendments were drafted "to reduce the cost of Longshore coverage for employers in the covered industries in a manner which will disturb, to the most limited extent possible, the rights and benefits which the Longshore Act provides."[16] Congress intended to produce "a balanced product, one which retains important and needed protections for injured workers and their families, tempered by added employer, insurer, and Labor Department controls which will assure workers' compensation benefits to those deserving of them while also affording the means to better control program costs and abuse."[17]

Specifically, Congress recognized a pressing need to amend Section 44 in order to reduce government expenditures and encourage employer participation in

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[15] 33 U.S.C. 908(f), 944.

[16] 1984 U.S. Code & Cong. Admin. News 2736.

[17] House Report on Conference Report on S.38, L.H.W.C.A. Amendments of 1984 (September 18, 1984), *reprinted in* BRBS Rel. 256-11/84, at 5-85 (remarks of Representative Erlenborn).

monitoring cases in payment status when the Special Fund is paying on-going permanent disability compensation pursuant to Section 8(f).[18] To this end, the legislators amended Section 44 of the Act to base each employer's mandatory contribution to the Special Fund in part upon that employer's overall program participation and in part upon that employer's past utilization of the Fund. Thus, employers who placed more claims into the Fund for payment would be paying a greater share of the Fund's resources. However, Congress also changed Section 44 in order to provide employers with devices by which employers may maintain some control over claims in payment status. To this end, new earnings reporting requirements were imposed on claimants who receive on-going permanent disability compensation, whether from the employer or the Fund, and severe penalties are imposed on claimants who fail to report earnings upon request.[19]

Section 22 of the Act was also amended "to permit the modification of an award or review of a compensation claim at any time on the grounds of changed *circumstances* or mistakes."[20]

Considering Congressional intent and the purpose of the Act, considering the overall structure of the Act, and

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[18] House Report on Conference Report on S.38, L.H.W.C.A. Amendments of 1984 (Sept. 18, 1984), *reprinted in* BRBS Re. 256-11/84, at 5-84, 5-85 (remarks of Representative Miller).

[19] 1984 U.S. Code & Cong. Admin. News 2751.

[20] 1984 U.S. Code & Cong. Admin. News 2762 (emphasis added).

considering the practical effects of the Ninth Circuit decision below,[21] we respectfully suggest that the rule announced in the decision below undermines the balance between employer protections and delivery of benefits to deserving injured workers which Congress intended, is detrimental to the economic integrity of maritime employers, and impairs cost effective federal administration of the Act.

Given the perspective of the *Amicus* as a Longshore insurance carrier and experienced administrator of claims arising under the Act, including claims arising under Section 22 of the Act, we offer the following pragmatic discussion of why the decision below should be reversed.

ARGUMENT

I.

MODIFICATION OF PERMANENT DISABILITY AWARDS SUBSEQUENT TO CHANGE IN WAGE EARNING CAPACITY PRESERVES SCARCE ECONOMIC RESOURCES AND PROMOTES DELIVERY OF BENEFITS TO DESERVING WORKERS.

To illustrate how Section 22 modification proceedings work in harmony with the policies and intentions of Congress as discussed, *supra*, we offer the following factual example.[22]

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[21] *Rambo v. Director, Office of Workers' Compensation Programs*, 28 F.3d 86 (9th Cir. 1994).

[22] These facts are similar to an actual case which is, at the present time, pending before the Office of Administrative Law

The claimant, a thirty year old piledriver and union member for 12 years, injured his upper back in 1983 while lifting timber on the deck of a construction barge. Claimant's education was limited to a high school diploma and the job training as a laborer and piledriver which he had received from various marine construction employers over twelve years; however, as a senior union member and experienced piledriver, Claimant's hourly wage was $18.50; Claimant earned $44,500.00 during the year prior to his injury and had an estimated average pre-injury weekly wage of $855.77.

Claimant was treated for thoracic strain for two years without significant improvement in his subjective symptoms; he continued to have moderately severe pain upon lifting overhead and performing certain motions with his left arm and shoulder. Objective clinical testing evidenced possible thoracic outlet syndrome, and, in 1985, the treating orthopedic physician concluded that Claimant's condition was likely to remain stable into the indefinite future and it was inadvisable for Claimant to return to his pre-injury employment as a piledriver.

Claimant's claim for permanent total disability compensation was adjudicated by an administrative law judge who found that Claimant was permanently and totally disabled as the employer was, at the time of trial, unable to demonstrate the availability of suitable alternative employment given Claimant's limited education and vocational skills. Claimant continued to receive on-going

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Judges on the employer's motion for modification pursuant to Section 22.

permanent disability compensation at the statutory maximum rate with annual adjustments as announced by the Secretary for cost of living. Between 1985 and 1993, Claimant obtained a Bachelor of Arts degree with a concentration in international business from a state university, acquired computer skills, installed a personal computer in his home, and operated his own consulting business, at a loss, as a broker for international sales and purchases. Additionally, Claimant campaigned twice for a seat on his city council, travelled monthly out of state to various conventions and conferences of international business organizations, and vacationed several times each year at his favorite hunting and fishing locations. Claimant's physical condition remained the same; Claimant did not seek medical treatment and was able to control his physical symptoms through occasional use of over-the-counter pain medication and restricting his overhead movements and lifting activities with his left upper extremity.

Claimant's physical condition has not significantly changed; Claimant remains precluded from returning to his pre-injury employment as a piledriver. However, Claimant has rehabilitated himself by acquiring new vocational and social skills which, arguably, form the basis for employability. In this case, if the employer is allowed to move for modification of the existing permanent total disability award, the employer is granted the opportunity to present evidence of the availability of suitable alternative employment in the open labor market considering Claimant's present age, education, vocational skills, and physical condition. The parties are afforded

the same due process protections as provided by the Act in the initial determination of disability.

Assuming Claimant is employable, the employer may be able to reduce or eliminate its liability for on-going disability compensation to Claimant, thereby alleviating costs of administrating one claim and freeing compensation dollars for payment of compensation to other injured workers who are not presently employable. The Claimant is prevented from, what is essentially, double recovery in that the Act was never intended to provide compensation to those who are not economically disabled.[23]

However, the rule announced in the decision below, precluding modification proceedings under these facts, escalates costs to both employers and insurance carriers where the maritime insurance carrier is legally obligated to continue disability payments to a worker who is capable of participating in the work force. The carrier's increased costs of continuing payments, which are no longer subject to reduction by means of modification proceedings, will be passed to employers thereby escalating insurance costs to the detriment of the industry and upsetting the balance between competing interests which Congress has intended and endeavored to maintain.

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[23] *See also, Blake v. Ceres, Inc.*, 19 BRBS 219 (1987) (In that case, a permanent total disability award was made before the employer could identify suitable alternative employment. It was held that the employer should be allowed on a Section 22 motion for modification to present evidence of suitable alternative employment as wage earning capacity is a factor in modification proceedings. Otherwise, the worker could refuse offers of jobs within his capabilities which become available after he obtains a total disability award).

Similarly, the rule announced in the decision below would harm an injured worker who was initially found to have some residual post-injury wage earning capacity and was awarded on-going permanent partial disability compensation but who later experienced further loss of wage earning capacity due to a change in circumstances beyond his control. Absent a change in the injured worker's physical condition, such a worker would be foreclosed from modification proceedings to increase disability compensation and be foreclosed from access to vocational retraining or education needed to secure a new niche in the labor market unless services were available at public expense.

For example, in *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990), the claimant was employed as a welder when, in 1981, he suffered a series of low back injuries which left him with medical impairments and ability to perform only light work. He received a permanent partial disability award and was placed in a light duty job in the San Francisco Bay area until he was laid off for lack of suitable available light duty work. The claimant was compelled to move his family to another geographical area in order to reduce his living expenses but was unable to obtain light work in that geographical area with his limited vocational skills and physical impairments. Acknowledging that his physical condition had not changed, the claimant requested modification and an increase of his disability compensation award. It was held that the standard for determining disability is the same during Section 22 modification proceedings as during the initial determination, i.e., the issue is whether

employment is available which is suitable for the claimant considering his age, education, skills, and physical condition, and, until the employer demonstrates the availability of suitable alternative employment, the claimant is entitled to permanent total disability.

However, under the rule announced below, Mr. Vasquez would not have been able to seek modification, receive an increase in disability compensation, or engage the employer or the Department of Labor in a successful effort to rehabilitate him into sustainable employment.

II.

FLEXIBILITY IN MODIFICATION PROCEEDINGS FURTHERS PUBLIC POLICY AND CONGRESSIONAL INTENT TO PROMOTE FULL EMPLOYMENT AND ENGAGE INDUSTRY EMPLOYERS IN THE PROCESS OF REHABILITATING INJURED WORKERS WHENEVER POSSIBLE.

Modification, by either employer or injured worker, of permanent disability awards based on a change in earning capacity provides economic rewards for employers' participation in delivering vocational rehabilitation and job training services to injured workers. Active participation in job development by industry generally promotes higher levels of employment and reduces government waste. It is in the employers' interest to provide an injured worker with modified employment, direct job placement into new employment, or vocational re-training if, through modification proceedings, the employer can limit, reduce, or eliminate its liability for on-going lifetime payments of disability compensation.

However, the decision below discourages employers from offering modified employment, direct placement assistance, or retraining services of any kind because, absent a change in the employee's physical condition, the employer would have no opportunity to reduce its liability for on-going disability compensation. The decision below also indirectly encourages employers to delay adjudication of permanent disability cases until all avenues of identifying suitable alternative employment are exhausted as, once an award of permanent disability is made, the employer would lose any economic advantage from rehabilitation of the injured worker into the labor market.

III.

ALLOWING MODIFICATION BASED UPON CHANGE IN EARNING CAPACITY REDUCES ECONOMIC WASTE BY REDUCING COSTS OF ADMINISTRATION OF 8(F) CLAIMS TO BOTH EMPLOYERS AND THE DEPARTMENT OF LABOR.

In cases where the employer has qualified for Section 8(f) relief, the decision below also escalates costs to U.S. Dept. of Labor and maritime employers. Without the ability to modify awards based on a change in earning capacity, the Special Fund will continue to pay on-going permanent disability compensation and bear the costs of administration of the Fund in some cases where the injured worker has returned to workforce or is able to return to gainful employment. Additionally, the Special Fund assessments to the employer will remain at a proportionately higher rate despite the lack of the claimant's economic disability.

The 1984 amendments to the Act included amendments to Section 44(c)(2) in order to make the employers' annual assessments more equitable between self-insured employers and carriers who transferred a larger percentage of their compensation claims to the Fund for payment under Section 8(f) than those who transferred fewer claims.[24] The formula by which assessments were calculated was changed to assess higher contributions from employers who received more 8(f) relief. Therefore, employers were also granted a continuing interest in those claims and the potential for adjustment or termination of compensation payments through modification proceedings as the employers' financial obligations to the Special Fund are directly tied to the number of cases and aggregate sum of on-going permanent disability payments being made by the Fund on behalf of each maritime employer.

For example, in the instant case, Petitioner, Metropolitan Stevedore Company, requested and was awarded Section 8(f) relief on account of claimant's pre-existing permanent partial disabilities. Petitioner, therefore, paid Respondent, Mr. Rambo, permanent partial disability payments for 104 weeks. Thereafter, the administration and payment of Mr. Rambo's on-going permanent partial disability compensation was assumed by the Fund. However, Petitioner's Special Fund assessment was increased to account for the addition of Mr. Rambo's case and aggregate disability payments to the overall expenditures of the Fund. Pursuant to the decision below, neither the

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[24] 130 Cong. Rec. S11621 (daily ed. Sept. 20, 1984); 130 Cong. Rec. H9732, H9734-35 (daily ed. Sept. 18, 1984).

Fund nor the Petitioner is able to obtain modification of the original total disability award despite Mr. Rambo's tripled earnings and stable and continuous employment; the Fund continues to pay disability compensation and expend costs of administration of the claim; the employer continues to pay its yearly assessment to the Fund at a rate increased for Mr. Rambo's claim.

Clearly, Congressional intent in amending Section 44 in 1984 was to reduce costs of administration of the Special Fund and to engage the participating employers in the process of monitoring payment of on-going awards. The amended Section 44 accomplishes Congressional purpose only if viewed in conjunction with modification proceedings on the basis of change in earning capacity. Therefore, the decision below conflicts with Congressional intent and public policy to reduce the costs to government of administration of the Fund and provide a regulatory environment in which maritime employers can continue to thrive.

CONCLUSION

The Longshore and Harbor Workers' Compensation Act was crafted by Congress to provide liberal and certain wage loss compensation to a particular group of covered martime workers while, at the same time, providing financial protections and incentives for covered maritime employers in order to ensure the economic future of the industry. The express provisions of the original statute, the subsequent amendments in 1984, and the legislative history reflect clearly legislative and public

policies in favor of balancing the needs of injured workers against the needs of employers, insurance carriers, and the Department of Labor.

The decision below has an adverse impact on the public policies in favor of maintaining the economic viability of the maritime industry, returning injured workers to productive roles in the economy, and reducing government waste through effective legislation and administration of federal programs.

The examples discussed herein, adapted from recent actual cases and controversies arising in the course of Longshore claims administration and Department of Labor adjudication, demonstrate how the rule as announced by the Ninth Circuit will adversely affect both public and private interests. We respecfully urge this Court to reverse the decision below thereby assuring the continued flexibilty of Section 22 modification of permanent disability awards based upon earning capacity and assuring the continued balanced operation of the statutory scheme as intended by Congress.

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